Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1330

John Doe,

Petitioner,

v.

E. E. Pringle, D. E. Kelley, R. E. Lee, J. R. Carrigan, J. K. Groves, P. V. Hodges, and W. H. Erickson, individually and in their capacities as Justices of the Colorado Supreme Court,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JONATHON B. CHASE
University of Colorado
School of Law
Boulder, Colorado 80309
(303) 492-8428
COUNSEL FOR PETITIONER

OF COUNSEL:
Albert T. Frantz
7180 West 14th Ave.
Englewood, Colorado

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The Petitioner John Doe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 29, 1976, petition for rehearing and request for rehearing en banc denied on December 28, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the District of Colorado, not reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 29, 1976. A timely petition for rehearing and request for reconsideration en banc were denied on December 28, 1976, and this petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1245(1) (1970).

QUESTION PRESENTED

Whether a federal district court has subject matter jurisdiction, under 28 U.S.C. §1343(3) (1970), over claims for injunctive relief, under 42 U.S.C. §1983 (1970), against individual justices of a state's highest court wherein it is alleged that the defendants, in denying plaintiff admission to practice law, acted in violation of the Due Process and Equal Protection Clauses of the fourteenth amendment to the United States Constitution?

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 28:

§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of and State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

2. United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is a civil action brought by plaintiff pursuant to 42 U.S.C. §1983 (1970). On March 13, 1971 John Doe, plaintiff in this action, pleaded guilty to the charge of violating 26 U.S.C. §4744(a) (being a transferee of marijuana without having obtained a permit and without having paid the special tax thereon). Having served a sentence for this conviction in the Federal Correction Institution at La Tuna, Texas, plaintiff, a graduate of the University of Utah School of Law, applied for admission to the Bar of Colorado. In February, 1973, having fully disclosed his status as a convicted felon, plaintiff was permitted to take the Colorado Bar examination, which he passed. On March 1, 1973, the Bar Committee of the Colorado State Board of Bar Examiners, after an interview with the plaintiff, informed the Colorado Supreme Court that plaintiff was not qualified for admission to the Colorado Bar since he had been convicted of a felony. The interview had been limited to ascertaining whether possible grounds for excuse existed for the commission of the felony; plaintiff was given no opportunity to establish his present fitness to practice law. On March 13, 1973, the Colorado Supreme Court voted, in conference, to accept the Committee's report and to deny plaintiff's application.

On January 15, 1974 plaintiff requested that the Colorado Supreme Court reopen his case and permit him to establish his present fitness to practice law. On January 17, 1974, the Colorado Supreme Court requested the Bar Committee to conduct a hearing for that purpose. Four meetings were subsequently held by the Bar

Committee with the plaintiff between February and December of 1974. Only one of these meetings was transcribed. At the conclusion of these extensive inquiries the Committee made a factual determination that plaintiff had been rehabilitated and was presently fit to practice law in Colorado. On December 2, 1974, the Committee submitted its findings, recommendation, and plaintiff's application for admission to the Bar to the Colorado Supreme Court.

On January 10, 1975, Justice William H. Erickson of the Colorado Supreme Court advised plaintiff that the Court would not admit him to the practice of law in the State of Colorado. In response to an inquiry by plaintiff's counsel, Justice Pringle indicated to plaintiff that the hearing to which he was entitled by court rule, Rule 217, prior to being denied admission "by reason of any ethical or moral disqualification" was that conducted by the Bar Committee and that no further hearings would be held pursuant to Rule 217 by the court.

This action was thereafter brought under 42 U.S.C. §1983 and 28 U.S.C. §1343(3), seeking declaratory and injunctive relief requiring defendants to set aside their denial of plaintiff's application for admission to the Bar of the State of Colorado, to accept the findings of the Bar Committee of the Colorado State Board of Law Examiners as to plaintiff's present qualifications to practice law, and to admit plaintiff to the Bar of the State of Colorado.

Plaintiff alleges in this action four separate claims for relief. First, Rule

217, Colo.R.Civ.P., provides that "No applicant shall be refused admission by reason of any ethical or moral disqualification without an opportunity to be heard." Pursuant to that Rule, plaintiff's application was referred back to the Bar Committee for a determination of his present qualifications to counsel and advise others. Thereafter, the Bar Committee found the plaintiff to be rehabilitated and presently fit to practice law in Colorado and so certified to the Colorado Supreme Court. Disregarding the findings of the Bar Committee reached after the hearing required pursuant to Rule 217, and without any personal observation or independent hearing before the Colorado Supreme Court, the defendants denied plaintiff's application for admission in violation of their own rule, thus denying to plaintiff due process of law. Second, the defendants had never before rejected a favorable recommendation of the Bar Committee and did so without any factual basis therefor, thus acting arbitrarily and capriciously and denying plaintiff due process of law. Third, the defendants, in denying plaintiff's application for admission to practice law did so solely on the basis of his past felony conviction, thereby irrebuttably presuming that plaintiff is not now qualified to counsel and advise others in the conduct of their affairs, contrary to facts already found by the Bar Committee, in violation of plaintiff's right to due process of law guaranteed by the fourteenth amendment to the United States Constitution. Fourth, the defendants, while denying plaintiff the right to engage in the practice of law by reason of his prior felony conviction, have permitted others convicted of similar crimes under similar circumstances to practice law, thereby

denying plaintiff equal protection of the law guaranteed by the fourteenth amendment to the United States Constitution. A copy of the Complaint and selected appendices thereto are attached to this Petition as Appendix E.

The plaintiff's action was dismissed by the district court for lack of jurisdiction over the subject matter on the grounds that plaintiff claimed only that defendants acted unconstitutionally in denying his particular application to practice law and did not challenge the rule-making authority of the court or the general administration of a rule.

On appeal to the United States Court of Appeals for the Tenth Circuit, the district court's decision was affirmed. In an opinion written by Judge Barret, in which Judge Seth concurred specially, the court held that plaintiff was attempting to use 42 U.S.C. §1983 (1970) as a means of obtaining federal district court review of a decision of the Colorado Supreme Court and thereby "avoid his obligation to seek direct review in the United States Supreme Court," Appendix, at 35, by means of a writ of certiorari. Concurring in result, Judge Breitenstein stated: "A federal district court does not sit as an appellate court to review actions of a state supreme court. Doe's recourse was to petition the Supreme Court of the United States for certiorari review of the action of the state supreme court." Appendix, at 47.

Petitioner's petition for rehearing and request for reconsideration en banc were denied on December 28, 1976.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN MILDNER V. GULOTTA, 425 U.S. 901 (1976).

In Mildner v. Gulotta, 425 U.S. 901 (1976), affirming 405 F.Supp. 182 (E.D. N.Y. 1975) (three-judge court), this Court necessarily held that a federal district court has jurisdiction of a claim brought under 42 U.S.C. §1983 (1970), for injunctive relief against the judges of the state court responsible for bar supervision when it is claimed that they have acted to deny the plaintiff a right protected by the United States Constitution. That this Court so held, in affirming the decision of the three-judge district court below, is conclusively demonstrated by a review of the proceedings in the district court in Mildner and a review of the scope of this Court's jurisdiction on direct appeal from the decision of a three-judge district court.

Mildner v. Gulotta involved three separate challenges to the constitutionality of procedures used in New York for the disciplining of attorneys. Because of similarity of the claims, the three cases were consolidated for hearing before the three-judge federal district court. In the Mildner and Levin cases the referees assigned by the Appellate Division to hear and report on the charges against the two attorneys found that none of the charges were sustained by the evidence. In both cases cross motions to confirm and disaffirm the reports were filed with the Appellate Division and briefs were submitted in support of the motions. Without hearing oral argument in either case, the Appellate Division disaffirmed both reports, finding Mildner guilty of all three charges made against him and Levin guilty of one of the two charges made against him. Both were suspended from practice for a period of three years. In the third case, Gerzof, the referee found the charges sustained by the evidence and the motion to confirm the referee's report was granted by the Appellate Division. Gerzof was also suspended for a period of three years.

Following disposition by the Appellate Division, each of the suspended attorneys unsuccessfully sought leave to appeal to the Court of Appeals, New York's highest court. Thereafter, raising federal constitutional claims which apparently had not previously been raised before the state courts, 405 F. Supp. at 196, suits were filed in federal district court under 42 U.S.C. §1983 (1970). The claims raised by Levin, as recited in the opinion of Judge Neaher, were typical:

> The first is that New York Judiciary Law, §90, violates the due process and equal protection clauses of the Fourteenth Amendment because, unlike all other professionals licensed by the State of New York, it affords an attorney no appeal as of right from an adverse decision in an attorney disciplinary proceeding. The other claims are all that §90 violates the due process clause in various ways: it allows discipline to be imposed by the trier of fact without hearing the parties, observing the demeanor of the parties or witnesses, or

> hearing oral arguments of counsel; it empowers the Appellate Division, as trier of fact, to impose discipline without rendering a written statement of the evidence it relied upon or the reasons for its order, and without making any written findings of fact; and lastly, it empowers the Appellate Division to impose discipline on the basis of no evidence.

In addition, both Mildner and Gerzof complained that they were denied due process because their suspensions were allegedly based on records which were insufficient as a matter of law to sustain the determinations made against them.

Judge Neaher, writing in part for the majority, reviewed the equal protection and due process challenges to the New York procedures and concluded that they were without merit. The only question remaining was whether the court should exercise its unquestioned jurisdiction, and dismiss the case on the merits, or dismiss on grounds of comity. With respect to this issue, Judge Neaher, relying primarily on Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and the fact that none of the federal plaintiffs had raised his federal claims in attempting to secure a state appeal, and had thereby failed to fully avail himself of the full possibilities of state review, would dismiss the case on grounds of comity and not on the merits.

Judge Moore, concurring in the dismissal, refused to go along with Judge Neaher's decision insofar as it rested on grounds of comity and would dismiss the case on the merits.

In his opinion, in which he dissented on the merits, Judge Weinstein noted the propriety of federal court jurisdiction over plaintiff's claims, a point on which all three judges agreed, in language particularly applicable to this case:

> The plaintiffs present before this court are not maneuvering to have this court review a state court disciplinary decision for its fairness. Their attack is on the constitutionality of the state statutory procedure for disciplining state attorneys. None of them has asked this federal court to review any judicial conduct or rulings in the state disciplinary proceedings against him, such as evidentiary rulings or rulings on questions of law. Nor have they challenged the tradition of court control of the bar. Rather, they have requested that the statutory procedure be declared unconstitutional. The attorneys' individual cases do, however, illustrate unconstitutional results which may be produced by an application of the statute.

405 F.Supp. at 206. He then proceeded to agree with Judge Moore that exercise of the court's jurisdiction should not be stayed on grounds of comity, finding Huffman v. Pursue, Ltd., supra, inapplicable. 405 F.Supp. at 206-07.

In sum, two of the three members of the district court explicitly reached and passed upon the merits of the same type of constitutional claims raised by appellant in this action.* All three judges agreed that there was subject matter jurisdiction. Only one would have dismissed on grounds of comity.

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* In addressing himself to the claim that due process demanded a hearing involving personal observation by the ultimate trier of fact, Judge Neaher stated:

> First, while we agree that the opportunity to hear and observe the demeanor or witnesses is an essential element in the weighing and appraising of testimony, see Wingo v. Wedding, 418 U.S. 461 (1974), its importance diminishes when facts are developed and inferences may be drawn without reference to credibility. As already pointed out, a disciplinary proceeding is not a full-blown trial but an inquest--a gathering of facts concerning the conduct of an attorney, a subject more likely to be illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else. The referee's report in the Mildner case exemplifies the precise situation in which the documented evidence of the attorney's questionable financial transactions with another's money far outweighed the vacillating testimony of the complaining victim.

405 F.Supp. at 195 (emphasis supplied in part). Thus, the opinion specifically noted a probable constitutional distinction in cases in which credibility would be an important, if not the critical factor, such as in the determination of present moral fitness in the case at bar.

A direct appeal from the decision of the three-judge district court was taken to this Court, pursuant to 28 U.S.C. §1253 (1970), and this Court summarily affirmed. (1976). The assumption of jurisdiction over the direct appeal and affirmance in Mildner is of critical significance for purposes of the case at bar in light of this Court's holding in MTM, Inc. v. Baxley, 420 U.S. 799 (1975). In MTM plaintiffs filed suit in federal district court seeking to enjoin the operation of an Alabama nuisance statute on the grounds that is was unconstitutional. At the time the federal suit was filed there was already pending a suit in state court in which Alabama sought to enjoin the operation of the federal plaintiff's theater on the grounds that it was obscene and a nuisance under the state statute which was the subject of the federal suit. A three-judge court was convened and thereafter dismissed the federal suit on the basis of Younger v. Harris, 401 U.S. 37 (1971), without reaching the merits of the constitutional claims. A direct appeal was taken to this Court under 28 U.S.C. §1253 (1970). In dismissing the appeal for lack of jurisdiction, this Court stated:

> [A] direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below. [420 U.S. at 804.]

Assumption of jurisdiction over the direct appeal from the three-judge court in Mildner and affirmance of its decision

on the merits is a direct holding by this Court that there is subject matter jurisdiction over the claims raised by petitioner in this case. Assumption by this Court of jurisdiction in Mildner constitutes recognition that the decision below was one decided on the merits. Affirmance by this Court must mean that the court below properly reached the merits. Since this Court could neither have entertained jurisdiction over the appeal nor affirmed the decision below in Mildner without necessarily holding that a federal district court has jurisdiction to reach the merits of claims identical to those presented by petitioner in the case at bar, the Court of Appeals for the Tenth Circuit was bound by this Court's disposition in Mildner. Hicks v. Miranda, 422 U.S. 332, 34344 (1975).

The Mildner case is also instructive in identifying the specific point of error in the court's decision, below, in the case at bar. Throughout this litigation respondents and both lower courts have relied on cases such as MacKay v. Nesbett, 412 F.2d 846 (9th Cir.), cert. denied, 396 U.S. 960 (1969); Jones v. Hulse, 391 F.2d 198 (8th Cir.), cert. denied, 393 U.S. 889 (1968); Ginger v. Circuit Court, 372 F.2d 621 (6th Cir.), cert. denied, 387 U.S. 935 (1967); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962), for the proposition that a federal district court has no jurisdiction to review a state court's determination that a particular applicant will not be admitted to practice and that federal review of such a decision is available only by means of a writ of certiorari issued from this Court. Petitioner has as vigorously argued throughout this litigation that, although a federal district court

has no jurisdiction to collaterally review the decision of a state court on the merits, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), it does have jurisdiction to hear claims brought against the state court judges for injunctive relief to prevent them from engaging in conduct which violates the United States Constitution. Petitioner herein is not attempting to relitigate issues already determined, or which should have been, by the Colorado Supreme Court. The claims here are that the justices of the Colorado Supreme Court, in rejecting the favorable recommendation of the Bar Committee without any further hearing, denied petitioner due process and equal protection of the law. The distinction between a federal court claim asserting unconstitutional conduct by state court judges and one seeking collateral review of a state court decision is graphically illustrated in Mildner. In addition to the claims over which the court exercised jurisdiction and decided on their merits, the court in Mildner also dismissed one claim for lack of subject matter jurisdiction, citing, significantly, many of the cases relied on by respondents and the courts below in the case at bar:

> Finally, as to the claim of suspension on the basis of no evidence, we agree with the Attorney General that it appears to be an attempt to relitigate the merits of the State proceedings. Into that area we may not intrude. . . . [A] review of State court proceedings for possible constitutional error lies exclusively in the jurisdiction of the Supreme Court. . . . More specifically, §1983 does not extend the right to litigate

in a federal district court evidentiary questions which have been adjudicated on the merits in State proceedings, upon the claim that there was no evidence to support the State Action. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 1001-03, 43 L.Ed.2d 214 (1975).

We would therefore reject those claims raised in the Mildner and Gerzof complaints which suggest that the lack of evidentiary basis for the decisions was itself a denial of due process or equal protection, or constituted, when the resultant discipline was decreed, cruel and unusual punishment. See, e.g., MacKay v. Nesbett, 412 F.2d 846 (9 Cir.), cert. denied, 396 U.S. 960 (1969); Jones v. Husle [sic], 391 F.2d 198 (8 Cir.), cert. denied, 393 U.S. 889 (1968); Ginger v. Circuit Court, 372 F.2d 621 (6 Cir.), cert. denied, 387 U.S. 935 (1967); Gately v. Sutton, 310 F.2d 107 (10 Cir. 1962) . . . . [405 F. Supp. at 196.]

2. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IS INCONSISTENT WITH THE RATIONALE OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN TANG V. APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT, 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974).

Where rules for admission to practice law are not unconstitutional on their face there is no action by the state which can be said to deprive an applicant of a federally guaranteed constitutional right until the rule is construed and applied by the state's highest court or some other action is taken by the court in denying the application which gives rise to a claim of constitutional deprivation. Not until the action is taken is there an injury for which federal constitutional redress may be sought. Feldman v. State Board of Law Examiners, 438 F.2d 699, 702 (8th Cir. 1971), quoting from Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1967), cert. denied, 390 U.S. 1011 (1968). Such is the case at bar, where no action taken by any one could be said to raise federal constitutional issues until the respondents acted to deny the plaintiff's application. The issue posed by the case at bar is whether that unconstitutional action can be challenged in a federal district court; or must the federal claim be presented in the first instance to the very body charged as being the transgressor, with federal review available only by certiorari or appeal to the United States Supreme Court.

It is clear that at the juncture at which petitioner found himself, had he

presented his federal claims to the respondents and had those claims actually been considered and rejected, he would have been barred by the doctrine of res judicata from proceeding to relitigate those same federal claims in a federal district court.

In Tang v. Appellate Division of the New York Supreme Court, First Department, 487 F.2d 138 (2d Cir. 1973), cert. denied 416 U.S. 906 (1974) the plaintiff sought to challenge in a federal district court, under 42 U.S.C. §1983 (1970), the constitutionality of a rule of court as applied to him to bar his admission to practice law. Pursuant to court rule, a prerequisite to admission to practice in New York was six month's residency in New York. It was not clear, however, whether that requirement could be met by mere physical presence in New York for six months or whether actual domicile in New York for that period was required. Plaintiff, who was, and continued at all times relevant to be, domiciled in New Jersey, took up temporary residence in New York in a hotel for a period in excess of six months and applied for admission to practice. Construing the residence requirement as a domicile requirement, the Committee on Character and Fitness denied plaintiff's application. Plaintiff then petitioned the Appellate Division of the Supreme Court for an order to admit him. This petition was denied, the court affirming the Committee's construction of the residency requirement. Plaintiff then commenced his federal district court suit challenging the constitutionality of the rule as construed by the Appellate Division on the grounds that it impermissibly infringed the right to travel.

Affirming dismissal by the district court, a divided court of appeals held that the suit was barred by notions of res judicata and comity. Judge Mulligan, in that part of his opinion in which Judge Hays also concurred, stated:

> There is no doubt that after having been denied admission to the New York bar [by the Committee], Tang could have immediately initiated his §1983 action in the federal district court. In fact this is the usual procedure in cases where state admission requirements have been attacked on constitutional grounds. Instead he selected the state forum to raise the constitutional question which he had a perfect right to do.

The critical points of departure between the majority in Tang and Judge Oakes, dissenting, related, first, to the characterization of the proceeding before the Appellate Division as a judicial proceeding involving a choice of forum in which to litigate the federal issue raised by the Committee's denial of Tang's application and, second, whether the federal constitutional claims were ever presented to the state court. It was the stated premise of the majority that immediately following the Committee's denial an action could have been brought in federal district court. Perhaps this seeming inconsistency with Chaney, supra, can be explained by the New York rule that "[u]nless otherwise ordered by the appellate division, no person shall be admitted without a certificate from the proper committee. . . ." 487 F.2d at 144. Thus, as soon as the Committee certificate was

denied there was an injury for which redress could be sought. Choosing, then, to appeal to the Appellate Division by filing a petition against the Committee, in which the Committee was named as the respondent, constituted a choice of a state forum in which to litigate the federal constitutional question. Judge Oakes construed plaintiff's actions differently, suggesting that the proceeding before the Appellate Division was an administrative step necessary before the case was ripe for litigation in any forum, citing Chaney, supra, 487 F.2d at 144 n.2; and that it did not represent the choice of a judicial forum in which to litigate the federal claim.

What emerges clearly, however, from Tang, and what is of vital significance In the case at bar, is that had federal review not been available immediately following the Committee action, as Judge Oakes argued it was not, 487 F.2d at 144 & n. 2, and would not have been available until the Appellate Division acted on the application, the majority would have agreed that the federal action at issue was properly brought. It was only the majority's characterization of the proceeding before the Appellate Division as an invocation of that court as the judicial forum in which to litigate the federal claim that precluded what the majority perceived to be federal district court review of a state judicial determination, relying on Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). Had the petition before the Appellate Division been merely a part of the application process, as Judge Oakes argued, rather than a new judicial proceeding brought for the purpose of litigating the Committee's construction of the rule,

then there would have been no bar to instituting the federal suit.

Where, as in the case at bar, it is clear that no federal claim arose or could arise until the state supreme court acted, then, so long as no choice is made to litigate the federal claim in the state court, judicial relief in a federal district court is not foreclosed. See England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964).

In a state such as Colorado, where the state's highest Court is responsible for admitting persons to practice law, mere submission of an application to practice cannot be regarded as a choice of forum in which to litigate federal constitutional issues which may arise during the application process. Although the state's highest court, in passing on applications for admission, is exercising judicial power, it is doing so in a quasi administrative capacity rather than in its more usual capacity of hearing and deciding cases. See In re Summers, 325 U.S. 561 (1945); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 158 n. 9 (1971); Mendez v. Heller, 380 F.Supp. 985, 992-93 (E.D.N.Y. 1974). Thus, unless some further action is taken by a disappointed applicant to present legal arguments to the court, the application, alone, cannot suffice to invoke the doctrine of res judicata to bar the commencement of an action in federal district court asserting federal constitutional claims arising out of the application denial. Such is the clear teaching of the Court of Appeals for the Second Circuit in Tang and is contrary to the disposition by the Court of Appeals for the Tenth Circuit in the case at bar.

3. UNLESS THE FEDERAL DISTRICT COURT HAS JURISDICTION OVER THE CLAIMS ASSERTED HEREIN, THERE CAN BE NO FEDERAL REVIEW OF SUBSTANTIAL FEDERAL QUESTIONS.

The federal claims asserted in this action are substantial. The justices of the Colorado Supreme Court agreed with petitioner that the ultimate question with respect to his moral fitness to practice law was not what he had done in the past, but his fitness at the time of his application. His case was reopened and referred back to the Bar Committee for such a determination. Following extensive hearings before the Bar Committee, petitioner was found to be rehabilitated and presently morally fit to practice law and he was recommended to the respondents for admission. Without any further hearings and in the face of the findings of the Committee, petitioner's application was denied. The due process implications of such action are substantial, as is petitioner's equal protection claim that others similarly circumstanced had been admitted to practice. Unless the federal district court has jurisdiction to hear these claims, federal review of these allegations of constitutional injury will be unavailable.

It is elementary that United States Supreme Court review of a state court determination cannot be had if the federal issue on which review is sought has not at least been presented to the state court. It has been suggested by respondents herein that, after having his application denied, petitioner should have filed a petition for rehearing before the Colorado Supreme Court wherein he should have presented his claims of federal constitutional injury.

But Rule 40, Colo.R.App.P., providing for rehearings, is not available to a denial of an application for admission. Pursuant to Rule 40(a) such a petition must be filed "within fourteen days after entry of judgment. . . ." Colo.App.Rule 36 provides for entry of judgment, and in cases of applications for admission there is no entry of judgment. In the case at bar, for example, there is no notation of a decision entered by the clerk on the docket. No judgment was entered and none mailed by the clerk to the "parties" as required by the Rule. In fact, the clerk of the Colorado Supreme Court has no record whatever of any disposition of plaintiff's application for admission. See also Colo.App. Rule 45(b), (c). Moreover, a petition for rehearing is designed to permit a disappointed party to direct the court's attention to the points previously raised which have been "overlooked or misapprehended." Colo.R. App.P., Rule 40. A petition for rehearing is not for the purpose of presenting arguments for the first time or to challenge the action taken by the court as being itself a violation of the Constitition.

It would appear that in order to present his claims of constitutional denial to the Colorado Supreme Court petitioner would have to initiate some new proceeding before the Colorado Supreme Court pursuant to Rule 241(c), Colo.R. Civ.P., although no specific provision for such a proceeding is provided for in any of the court's rules. But, even assuming that there was some way to raise petitioner's federal claims before the Colorado Supreme Court, there would be no record on which a rejection of such claims by the Colorado Supreme Court could be reviewed

by this Court. To suggest that the body actually challenged as the constitutional transgressor should have the sole responsibility for determining the truth of the factual allegations giving rise to the claims and to have the exclusive control over the record on which this Court is to review the adjudication of the federal claims would raise other very serious due process questions. See Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Kugler v. Helfant, 421 U.S. 117 (1975).

There are issues fact in this case as to whether or not the respondents, in denying petitioner's application, reviewed the entire record made before the Bar Committee or merely, as petitioner has alleged in his Complaint, paragraph 20, Appendix, at 81, only his application for admission, the Certificate of the Bar Committee, and two memoranda. There is certainly an issue of fact raised with respect to petitioner's Fourth Claim for Relief based on the Equal Protection Clause. Of course at this stage of the litigation, prior to the filing of an Answer, there is no way to determine what issues of fact may be joined ultimately. Whatever may be the case when pure questions of law are involved, there is no way federal claims raising issues of fact can be reviewed by a federal court of any kind -- or any other court, for that matter -- according to the holding of The Court of Appeals for the Tenth Circuit in this case.

CONCLUSION

For the reasons above-stated, petitioner respecfully requests this Court to grant his petition for certiorari and summarily reverse the decision of the Court of Appeals for the Tenth Circuit on the

basis of this Court's decision in Mildner v. Gulotta, 425 U.S. 901 (1976) or, in the alternative, to set the case for plenary hearing on the issues raised herein.

Respectfully submitted,

Jonathon B. Chase
University of Colorado
School of Law
Boulder, Colorado 80309
COUNSEL FOR PETITIONER

OF COUNSEL:

Albert T. Frantz
7180 West 14th Avenue
Englewood, Colorado

Appendix A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 75-1875

JOHN DOE,

Plaintiff-Appellant,

v.

E. E. PRINGLE, D. E. KELLEY, R. E. LEE, E. C. DAY, J. K. GROVES, P. V. HODGES, and W. H. ERICKSON, individually and in their official capacities as Justices of the Colorado Supreme Court,

Defendants-Appelles.

Appeal from the United States District Court for the District of Colorado (D.C. No. 75-A-384)

Submitted: September 24, 1976

Jonathon B. Chase, University of Colorado School of Law, Boulder, Colorado (Albert T. Franz on the brief) for Plaintiff-Appellant.

Mary J. Mullarkey, Assistant Attorney General, (J. D. MacFarlane, Attorney General, Jean E. Dubofsky, Deputy Attorney General, Edward G. Donovan, Solicitor General, and Mary A. Rashman, Assistant Attorney General, on the brief) for Defendants-Appellees.

Before SETH, BREITENSTEIN, and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

John Doe appeals from the district court order granting the appellees' (defendants below) motion to dismiss his civil rights complaint and causes of action, for lack of subject matter jurisdiction.

Doe graduated from an accredited law school. He successfully completed the Colorado Bar examination in February of 1973. In his application for admission to the Colorado Bar, Doe had disclosed his status as a convicted felon. He served a sentence following a 1971 guilty plea to violation of 26 U.S.C.A. §4744(a) (unlawful possession, transportation, or concealment of marijuana without payment of the federal transfer tax). In light of the felony conviction -- and with knowledge of the fact that he achieved a passing score on the examination -- the Colorado State Board of Law Examiners found that Doe was "not properly qualified for admission to the Colorado Bar since he has been convicted of a felony." Subsequently, upon review, the Colorado Supreme Court unanimously adopted the recommendations and findings of the Bar Committee of the Board in formally denying Doe's admission.

On January 15, 1974, Doe requested that the Colorado Supreme Court reopen his case. The Court granted the request by directing the Bar Committee to conduct a hearing for the purpose of reconsidering Doe's application. The Bar Committee met with Doe some four occasions over a period of eleven months. A record of only one of the meetings was transcribed. On December 2, 1974, the Committee submitted its findings and recommendation that Doe had been rehabilitated and that he was presently

fit to practice law. On January 10, 1975, the Colorado Supreme Court unanimously determined, evidenced by a letter from Justice Erickson to Doe, that "on the basis of the proofs submitted on your ethical and moral qualifications, (the Court) has denied your application." Doe thereafter (having been informed by Chief Justice Pringle that he had exhausted his available avenues of relief under Colorado law) filed the instant proceeding seeking relief pursuant to 42 U.S.C.A. §1983. He alleged jurisdiction pursuant to 28 U.S.C.A. §1343(3).

Doe's complaint named as defendants the seven Justices of the Colorado Supreme Court. It contains four separate claims for relief, three anchored to the Due Process Clause and one to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, to-wit: (1) That the Colorado Supreme Court violated Rule 217 of the Colorado Rules of Civil Procedure which provides in relevant part that "no applicant will be refused admission by reason of any ethical or moral disqualification without an opportunity to be heard. Hearing shall be had before the Court en banc, or otherwise as the Court shall direct"; and that by disregarding the recommendation of the Bar Committee and without the benefit of independent hearings the Court denied Doe due process of law; (2) That the Colorado Supreme Court had never before rejected a favorable recommendation of the Bar Committee and that in rejecting the recommendation in his case, the Court did so without any factual basis, thus acting arbitrarily and capriciously in violation of his right of due process of law, (3) That the Court's refusal to admit him was

based solely on his past felony conviction, thereby irrebuttably presuming that he is not now qualified to practice, in violation of his right of due process of law, and (4) That other applicants for admission who have been convicted of similar felony offenses at about the stage of their professional careers as Doe have been admitted to the practice of law in Colorado and as a result Doe has been denied equal protection of the law. The relief sought is a declaratory judgment, a permanent injunction and a specific order setting aside the Colorado Supreme Court's denial of Doe's application.

The United States District Court, in denying Doe relief, declared that there is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules [Keenan v. Board of Law Examiners of North Carolina, 317 F. Supp. 1350 (E.D.N.C. 1970); Goldsmith v. Pringle, ___ F. Supp. ___, No. 74-A-982 (D. Colo. Aug. 4, 1975); Huggman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont. 1974), aff'd 419 U.S. 955 (1974); Brown v. Supreme Court of Virginia, 359 F. Supp. 549 (E.D. Va. 1973), aff'd 414 U.S. 1034, rehearing denied, 414 U.S. 1138 (1974)],

such is not true where review of a state court's adjudication of a particular application is sought. The Court ruled that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States. The Court relied on the so-called "Theard Doctrine" announced in Theard v. United States, 354 U.S. 278 (1957), which involved a proceeding to disbar a lawyer from practice in federal court who had previously been disbarred by the Supreme Court of Louisiana for forging a promissory note at a time when he was suffering from a degree of insanity. Solely because of his disbarment by the state court, the attorney was subsequently disbarred by a federal district court by reason of a rule which provided that such action may be taken "whenever . . . any member of its bar has been disbarred . . . from practice . . . in any other court." Of significance to the district court in the case at bar (and to this Court on appeal) is the following language set forth in Theard, supra:

> It is not for this Court, except within the narrow limits of review open to this Court, as recently canvassed in Konigsberg v. California . . . and Schware v. Board of Law Examiners . . . to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of court, the state judicature and the federal judiciary, have autonomous control over the conduct of their officers,

> among whom . . . lawyers are included . . . if the accusation (before the federal court) rests on disbarment by a state court, such determination brings title deeds of high respect. But it is not conclusively binding on the federal courts. . ."

354 U.S., at pp. 281, 282.

The district court also relied upon Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962), which involved a civil rights action brought against the members of the Supreme Court of Colorado seeking to require them to set aside an order of disbarment. The primary Due Process complaint was aimed at the fact that the Supreme Court had entered the order of disbarment without permitting Gately to present evidence of the truth of his public allegation that the Chief Justice of the Colorado Supreme Court had accepted a bribe to influence or control the Court's decision in an appeal pending before it in which Gately represented the appellant. This Court denied relief and held, inter alia:

> The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct . . . The federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct.

310 F.2d, at 108.

and:

> . . . a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had . . . Furthermore, the federal courts have no jurisdiction to issue writs of mandamus to direct state courts or other officers in the performance of their duties, including disbarment proceedings.
>
> 310 F.2d, at 108.

The district court also cited MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969), cert. denied, 396 U.S. 960 (1969), which involved a challenge to the action of a majority of the Justices of the Alaska Supreme Court who had entered disciplinary orders suspending MacKay from the practice of law for a period of one year. The Court cited Theard, supra, Gately, supra, and other opinions in support of this rule:

> . . . orders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in the lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems . . . A federal court may, of course, examine a state court disciplinary proceeding if the state court's order is offered as the basis for suspending or disbarring an attorney from practice before a federal court. [Underlining supplied.]
>
> 412 F.2d., at 846.

See also: Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967), cert. denied, 387 U.S. 935 (1967).

The district court's order denying Doe relief was accompanied by a detailed memorandum. In treating Doe's attempt to distinguish the act of denying an applicant the right to practice law from the judicial nature of the act of disbarment (in a due process setting), the Court rejected Doe's argument that since the Colorado Supreme Court is not required to conduct the "adjudicatory" proceedings mandated in disbarment proceedings leading to denial of an admission to practice law, the denial must necessarily be an administrative act. The significance, according to Doe, is that a claim involving deprivation of a federally protected right must be presented to the state court in compliance with the doctrine of exhaustion of available remedies, except when the court "in exercise of its judicial authority is performing a quasi-administrative function." (Brief of Appellant, p. 6.) The Court properly set this contention down by reference to these words from In re Summers, 325 U.S. 561 (1945):

> The act of admission is an exercise of judicial power, . . . a judgment, . . . even though it is not considered a judicial proceeding.
>
> 325 U.S., at 565, 566.

Doe also argues that the doctrine of comity does not preclude the federal court's review of the processes used by a state court in denying his application for admission to the bar.

I.

We concur in the district court's finding that it is without subject matter jurisdiction to review a final order of the Colorado Supreme Court denying a particular application for admission to the Colorado Bar. This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights. The Court did not err in distinguishing the above rule from the rule that a federal district court may exercise jurisdiction in relation to review of alleged federal constitutional due process or equal protection deprivations in the state's adoption and/or administration of general rules and regulations governing admission. The district court properly invoked the "Theard Doctrine." See also: Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); MacKay v. Nesbett, supra, Feldman v. State Board of Law Examiners, supra, Gately v. Sutton, supra.

This action is, in essence, an attempt by Doe to seek review in inferior federal courts of the entire state proceedings, including the order of the Colorado Supreme Court refusing to grant his second application for admission. That function is one reserved exclusively to the United States Supreme Court. See: Schware v. Board of Bar Examiners of New Mexico, supra; Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Theard v.

United States, supra; Gately v. Sutton, supra.

Doe cannot invoke the provisions of §1983 of the Civil Rights Act in federal district court so as to circumvent and avoid his obligation to seek direct review in the United States Supreme Court. The Colorado Supreme Court's jurisdiction both with respect to admission and disbarment proceedings has its source in Colo. R. Civ. P. 241(c). It is "original and exclusive" in relation to licensing and disciplinary proceedings. People v. Buckles, 453 P.2d 404 (Colo. 1968).

In Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) we stated that the Civil Rights Act was not enacted for the purpose of disciplining local law enforcement officials, and that only aggravated deprivations of personal rights guaranteed by the Constitution and laws of the United States create cognizable actions, i.e., illegal search and seizure, illegal arrest and assault, physical abuse while incarcerated, refusal to permit an accused to consult with an attorney, use of threats and intimidation to force a change of plea, etc. See also: Marland v. Heyse, 315 F.2d 312 (10th Cir. 1963).

In Wells v. Ward, 470 F.2d 1185 (10th Cir. 1972) we reviewed the occasion for enactment of the original Civil Rights legislation. It was there noted that post Civil War conditions, primarily in the southern states, were such that Blacks and Union sympathizers were persecuted by the Ku Klux Klan without protection of state laws or state law enforcement agencies. These conditions generated federal legislation intended to provide a remedy to

either overcome state laws or to provide a remedy where the state had elected not to do so.

In the course of recent years — but certainly not including the year 1976 — the United States Supreme Court recognized and assumed subject matter jurisdiction in many previously uncharted areas involving affairs of or within the states, with like jurisdiction recognized in federal district courts and circuit courts of appeal. A few examples are: civil rights proceedings challenging state action terminating a teacher's employment contract when the teacher alleges that the termination was in reprisal for his exercise of protected First Amendment speech [Perry v. Sindermann, 408 U.S. 593 (1972)]; denial of a state welfare recipient's receipt of welfare funds without benefit of certain due process procedural rights guaranteed the recipient under the Fourteenth Amendment [Goldberg v. Kelly, 397 U.S. 254 (1970)]; and a state's revocation of parole without granting the parolee minimal procedural due process rights as guaranteed by the Fourteenth Amendment [Morrissey v. Brewer, 408 U.S. 471 (1972)].

Part II of this opinion refers to a series of opinions, primarily those rendered by the United States Supreme Court in 1976, which we believe reflect a pronounced restriction of subject matter jurisdiction in the federal courts relating to Civil Rights Acts challenges aimed at actions taken by state officers or agents. The trend is reflective of the concern expressed by this observation in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971):

> . . . The Proliferation of litigation resulting from the expanded use of §1983 is apparent to anyone familiar with the reported decisions of the courts of the United States. The existence of the §1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. . .
>
> 448 F.2d, at 261.

II.

Certain United States Supreme Court opinions, particularly some rendered this year, one of which is closely akin to the case at bar, lend persuasive weight to the proposition that federal court subject matter jurisdiction in the civil rights area challenging actions taken under color of state law has been restricted in scope.

The trend may have been foreordained following Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Mackell, 401 U.S. 66 (1971). These decisions held that a federal district court could not enjoin a pending state court criminal prosecution enforcing an obscenity statute in recognition of the right of the ". . . state courts to try cases free from interference by federal courts." 401 U.S., at 43. Hicks v. Miranda, 422 U.S. 332 (1975) expanded the Younger - Samuels doctrine to prohibit federal court action in those cases where a party is charged in a state criminal proceeding relating to the same subject matter involved in a pending federal suit where there has been no answer then filed in the federal proceeding. Hicks held that the Younger rule applied ". . . where state criminal proceedings

are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court . . ." 422 U.S., at 349. To be sure, the restraints exercised cannot be placed in any specific doctrinary category. They do, however, generally seem to blend with nomenclature such as "abstention," "equitable restraint," "lack of subject matter jurisdiction," or "in recognition of the principle of comity" in our system of federalism with pronounced reluctance to permit federal court interference with state court proceedings and/or state actions involving a federal constitutional claim.

One 1976 opinion is closely akin to the case at bar. The federal courts were denied subject matter jurisdiction in a civil rights challenge brought by a disciplined member of the bar of New York both in regard (a) to the constitutionality of the state's general rules and regulations governing disciplinary actions and the administration thereof and (b) to the alleged denial of a full, fair and meaningful opportunity to be heard by the statutory trier-of-fact. The United States Supreme Court summarily affirmed, 44 U.S.L.W. 3543, ___ U.S. ___, (March 29, 1976) the three-judge opinion in Mildner v. Gulotta, 44 U.S.L.W. 2182 (October 28, 1975, USDC E.N.Y.), wherein that Court, two to one, upheld the New York procedure whereby disciplinary complaints against attorneys are first made to the Appellate Division of the Supreme Court, which in turn, if the case so warrants, refers the charges to a referee who conducts a hearing and prepares a report setting forth his findings of fact and conclusions of

law which is then filed with the Appellate Division, together with a transcript. The parties then make motions to affirm or disaffirm the referee's findings. The Appellate Court may then confirm or disaffirm the report in whole or in part, may make new findings with or without additional testimony and may order a new hearing. Usually, the Appellate Division does not take new evidence or hear oral arguments. In practice, the Appellate Division issues a summary statement either affirming or disaffirming the referee's findings, without giving any reasons for its decisions. Following a suspension or disbarment order from the Appellate Division, the attorney involved is afforded an appeal as a right to the New York Court of Appeals but only with respect to issues of law involving construction of the state or federal constitutions, or in a case in which an Appellate Division justice dissents. The challenge made in Mildner was that this procedure denies a disciplined attorney a full, fair and meaningful opportunity to be heard by the statutory trier-of-fact, together with the full scope of appellate review afforded all other "litigants" and particularly all other "professionals" whose licenses to practice are revoked or suspended. The majority held that there is no consitutional infirmity in the entire procedure and specifically that there is no denial of fundamental fairness by not providing the accused attorney or his witnesses the right to be heard personally by the body charged with the adjudicative responsibility. The dissenting judge opined that the New York procedures denied due process of law to disciplined attorneys in failing to provide a meaningful hearing before the trier-of-fact when the credibility of witnesses is involved and by

failure to provide opportunity to present oral arguments before the final adjudicative body.

Other 1976 opinions of the United States Court which we interpret as effecting restrictions upon the subject matter scope of federal court jurisdiction in civil rights suits challenging state actions are:

(1). Rizzo, et al. v. Goods, et al., ___ U.S. ___, 44 U.S.L.W. 4095, (January 21, 1976). This case involved two class action suits brought under 42 U.S.C.A. §1983 against the Mayor of Philadelphia, the Police Commissioner and others, alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens. The Supreme Court rejected the District Court's flat pronouncement that a federal court's legal power to "supervise the functions of the police department . . . is firmly established" and held that when a plaintiff seeks to enjoin the activity of a state governmental agency or official, the frame of reference must recognize the system of federal courts representing the nation, subsisting side by side with 50 state judicial, legislative and executive branches dictating that:

> . . . even where the prayer for injunctive relief does not seek to enjoin the state criminal proceedings themselves, we have held that the principles of equity nonetheless militate heavily against the grant of injunction except in the most extraordinary circumstances. In O'Shea v. Littleton, supra, we held that "a major continuing intrusion of the

> equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted." And the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).
>
> * * *
>
> . . . We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of government, but against those in charge of an executive branch of an agency of state or local governments . . . Indeed, in the recent case of Mayor v. Educational Equality League, 415 U.S. 604 (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying "there are also delicate issues of federal - state relationships underlying the case."
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> 44 U.S.L.W., at pp. 4100, 4101.

(2) Imbler v. Pachtman, ___ U.S. ___, 96 S.Ct. 984 (1976). The Court held that state prosecutors are absolutely immune from suit while pursuing their prosecutorial activities.

(3). Paul v. Davis, ___ U.S. ___, 44 U.S.L.W. 4337, (March 23, 1976). The

Court held that a §1983 and Fourteenth Amendment due process claim could not prevail in an action brought by Davis against Paul, a Chief of Police, who had circulated a photographic "flyer" of Davis bearing his name and identifying him as an "active shoplifter," which proved to be untrue. The Court held that the infliction by state officials of a "stigma" to one's reputation, standing alone, apart from some more intangible interest such as employment, recognized and protected by state law, or some interest guaranteed in one of the provisions of the Bill of Rights which has been "incorporated" into the Fourteenth Amendment, does not constitute "liberty" or "property" interests sufficient to invoke the procedural protections of the Due Process Clause of the Fourteenth Amendment.

(4). Kelley, Commissioner v. Johnson, 425 U.S. 238 (1976). This case involved a §1983 action by a policeman to a hair-length regulation promulgated by the county police department, wherein the policeman sought declaratory and injunctive relief. The Fourteenth Amendment was invoked on the grounds that the regulation denied the policeman his right of free expression under the First Amendment in that it was "not based upon the generally accepted standard of grooming in the community" and that it placed "an undue restriction" upon his activities. The District Court dismissed the complaint and cause of action. The Court of Appeals reversed, holding that the fact that a police force is organized "with a centralized administration and a disciplined rank and file for efficient conduct of its affairs" did not foreclose the claim, but instead bore only upon "the

existence of a legitimate state interest to be reasonably advanced by the regulation." The Supreme Court reversed the Court of Appeals, holding that the challenged regulation did not violate any right guaranteed the policeman under the United States Constitution. The Court stated, inter alia:

> . . . the hair-length regulation cannot be viewed in isolation, but must be rather considered in the context of the county's chosen mode of organization for its police force . . . The promotion of safety of persons and property is unquestionably at the core of the state's police power . . . Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the state's police power . . . [cases cited] . . . Having recognized in other contexts the wide latitude accorded the government in the "dispatch of its own internal affairs," Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961), we think Suffolk County's police regulations . . . are entitled to similar weight.
>
> 425 U.S., at 247.

(5). Bishop v. Wood, ___ U.S. ___, 44 U.S.L.W. 4820, (June 10, 1976). This case involved a §1983 suit brought by a city policeman seeking reinstatement and back pay following his termination without a hearing. The city manager had in-

formed him privately that his dismissal was based on failure to follow orders, poor attendance at police training classes, causing low morale, etc. The policeman alleged that his employment status was a property interest protected by the Due Process Clause of the Fourteenth Amendment and that inasmuch as the explanation for his termination was false, he was also deprived of an interest in liberty protected by the Due Process Clause. The Supreme Court denied the relief requested in holding, (a) that the policeman had no property interest in employment because the state law did not provide him with an enforceable expectation of continued employment, by statute or contract, and thus his discharge did not deprive him of a property interest protected by the Fourteenth Amendment, and (b) that he was not deprived of a federally protected liberty interest, even assuming that the oral reasons given for his discharge are false, because the reasons were not publicly stated and accordingly could not form the basis for impairment of good name, reputation, honesty, or integrity. Of particular interest is this dicta:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. . . the Due Process Clause of the Fourteenth Amendment

> is not a guarantee against incorrect or ill-advised personnel decisions.

44 U.S.L.W., pp. 4822, 4823.

Although the subject matter did not involve the Civil Rights Acts, we see the Supreme Court's opinion in Stone v. Powell, ____ U.S. ____, 44 U.S.L.W. 5313, (July 6, 1976) as indicative of a growing trend toward a "hands off" attitude by the federal courts involving subject matter jurisdiction relating to challenges of state actions or inactions. There the Court held that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. While adhering to the view that the court-made exclusionary rule continues to remain in force and effect at state criminal trials and in its enforcement on direct appeals of state court convictions, the Court said:

> But the additional contribution, if any, of the consideration of search - and - seizure claims of state prisoners on collateral review is small in relation to the costs . . . there is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search - and - seizure claims could not be raised if federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive at trial or the reversal of convictions on direct

review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after incarceration of the defendant.

44 U.S.L.W., at p. 5321.

WE AFFIRM.

No. 75-1875, DOE v. PRINGLE

Breitenstein, Circuit Judge, concurring in result.

I concur in the result because I am convinced that the federal district court lacked subject matter jurisdiction. The Supreme Court of Colorado has exclusive jurisdiction over the admission to practice in the Colorado courts. In the exercise of that jurisdiction it denied to Doe the right to practice. No rule or regulation pertaining to admission of attorneys is attacked. Doe's sole claim is that in his particular situation the action of the Colorado Supreme Court denied his federal constitutional rights to due process and equal protection. The action of the Colorado court was judicial rather than administrative. A federal district court does not sit as an appellate court to review actions of a state supreme court. Doe's recourse was to petition the Supreme Court of the United States for certiorari review of the action of the state supreme court. See Konigsberg v. State Bar of California, 353 U.S. 252, 258.

No. 75-1875 - JOHN DOE v. E. E. PRINGLE et al

SETH, Circuit Judge, concurring specially:

I concur in the conclusion that the trial court was correct in its dismissal of plaintiff's causes of action by reason of lack of jurisdiction as described by Judge Barrett, and based by him on Theard v. United States, 354 U.S. 278, Gately v. Sutton, 310 F.2d 107 (10th Cir.), and MacKay v. Nesbett, 412 F.2d 846 (9th Cir.).

Appendix B

NOVEMBER TERM - December 28, 1976

Before The Honorable David T. Lewis,
Chief Judge,
The Honorable Jean S. Breitenstein,
Senior Circuit Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle,
Circuit Judges

JOHN DOE,)
)
Plainitff-Appellant,)
)
vs.)
)
E. E. PRINGLE, et al,)
)
Defendants-Appellees.)

The Court, upon its own motion and in order to correct a clerical error, recalls its order of December 27, 1976, in the captioned cause and amends and reissues the order as follows:

This matter comes on for consideration of the appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth, Breitenstein, and Barrett, to whom the case was argued and submitted, on the ground that the District Court lacked subject matter jurisdiction.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

/s/
Robert L. Hoecker
Chief Deputy Clerk

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil No. 75-A-384

JOHN DOE,

Plaintiff,

v.

E. E. PRINGLE, D. E. KELLEY, R. B. LEE, E. C. DAY, J. K. GROVES, P. V. HODGES, and W. H. ERICKSON, individually and in their official capacities as Justices of the Colorado Supreme Court,

Defendants.

Messrs. Jonathon B. Chase, University of Colorado School of Law, Boulder, Colorado, and Albert T. Frantz, 7180 West 14th Avenue, Englewood, Colorado, for Plaintiff; Mr. J. D. MacFarlane, Attorney General, by Mr. Gene Lucero and Ms. Ruthanne Gartland, Assistants, 104 State Capitol, Denver, Colorado, for Defendants.

MEMORANDUM OPINION AND ORDER

ARRAJ, Chief Judge

Plaintiff John Doe[1] is a law school graduate who in 1971 pleaded guilty to violating 42 U.S.C. §4744(a) (unlawful possession, transportation, or concealment of marihuana without payment of the federal "transfer tax").[2] After serving a sentence of confinement, plaintiff applied for admission to the Colorado bar, disclosing in his application the fact of, and circumstances surrounding, his felony conviction. In February 1973, plaintiff

1. The court granted plaintiff's motion for leave to prosecute this action under a fictitious name and to suppress or seal certain exhibits attached to the Complaint.

2. This statute was repealed by Pub. L. 91-513, tit. III, §1101(b)(3)(A) (Oct. 27, 1970). For references to the effective date of repeal and to the "savings provision," see, 26 U.S.C.A. §§ 4741 to 4746 (Supp. 1975).

was permitted to sit for the state's bar examination. Although he achieved a passing score, the Bar Committee of the Colorado State Board of Law Examiners found that Mr. Doe was "not properly qualified for admission to the Colorado Bar since he has been convicted of a felony." Subsequently, the Colorado Supreme Court by unanimous vote adopted the Committee's findings and recommendations, and plaintiff's application for admission was formally denied.

On January 15, 1974, counsel for plaintiff requested that the case be reopened. The court granted the request and directed the Bar Committee to conduct a hearing for purposes of reconsidering Mr. Doe's application. During the next eleven months, the Committee met with plaintiff on four occasions, and finally, on December 2, 1974, concluded that he "had been rehabilitated and was presently fit to practice law in Colorado." Then on January 10, 1975, in a letter from Mr. Justice Erickson, the Colorado Supreme Court advised plaintiff that "on the basis of the proofs submitted on your ethical and moral qualifications, [the court] has denied your application." A handwritten entry to that effect had been placed on plaintiff's application on that date.

After he was informed that his application had been denied and that his avenues of relief under Colorado law were exhausted, plaintiff commenced the instant action pursuant to 42 U.S.C. §1983. The Complaint names as defendants the seven Justices of the Colorado Supreme Court and states four separate claims for relief, three predicated upon the Due Process Clause and one upon the Equal Pro-

tection Clause of the Fourteenth Amendment. Jurisdiction is alleged under 28 U.S.C. §1343(3).[3]

The matter is now before us on defendants' motion to dismiss for lack of jurisdiction over the subject matter and over the person of defendants, and for failure to state a claim for which relief may be granted. [Fed. R. Civ. P. 12(b)(1), (2), and (6), respectively] After considering the written memoranda and oral arguments of counsel, we reach the following conclusions.

Plaintiff's four constitutional claims may be described as follows. First, he contends that the Colorado Supreme Court violated Rule 217 of the Colorado Rules of Civil Procedure, which provides in relevant part:

> No applicant will be refused admission by reason of any ethical or moral disqualification without an

3. Unlike the other "bar cases" either pending or already decided in this district, the present action does not require the empanelling of a three-judge district court, because the constitutionality of no state statute, rule of court, or administrative regulation is at issue. [See, Rossiter v. The Law Committee of the State Board of Law Examiners, Nos. 73-1649 and 73-1650 (10th Cir. Jan. 10, 1974) (unpublished opinion)]

> opportunity to be heard. Hearing shall be had before the Court en banc, or otherwise as the Court shall direct.[4]

Plaintiff concedes that he was afforded a hearing as required by Rule 217 and that under the Rule, it was permissible for the court to delegate responsibility for this hearing to the Bar Committee. But he argues that once this responsibility was delegated to the Committee, "the defendants [were] bound by the factual determination reached as a result of said hearing. The defendants, by . . . refusing to accept the findings of the Bar Committee have failed to follow their own rules . . . ." This, according to plaintiff, deprived him of rights guaranteed by the Due Process Caluse of the Fourteenth Amendment.

In his second claim, plaintiff alleges that the Colorado Supreme Court had "never before rejected a favorable recommendation of the Bar Committee" and that in rejecting the recommendation in this case, the court acted "arbitrarily and capriciously," without any "factual basis" for its decision. Plaintiff contends that

4. This rule became effective on September 12, 1974, after plaintiff moved for reconsideration of his application. The previous notice and hearing provisions appear at Colo. R. Civ. P. 216 and 217 (CRS), 1963, v.1, ch.20 (Supp. 1971).

this too violates standards of fundamental fairness required by due process.

In Mr. Doe's third claim, he alleges that the court's refusal to admit him to practice in Colorado was based solely on the fact of his past felony conviction and that the court "conclusively presumed from [this] fact" that plaintiff is not presently qualified for admission to the Colorado bar. This "conclusive presumption," in light of the contrary conclusion drawn by the Bar Committee, is, in plaintiff's estimation, also violative of due process.

Finally, plaintiff alleges that other applicants for the Colorado bar "who have been convicted of felonies similar in nature to that committed by plaintiff and at or about the same stage of their professional careers have been admitted to the practice of law" in this state. Plaintiff suggests that such difference in treatment constitutes invidious discrimination in contravention of his right to equal protection of the laws.

By way of relief, Mr. Doe seeks both a declaratory judgment and a permanent injunction "setting aside" the Colorado Supreme Court's decision denying his application for admission. The operative effect of the relief sought--and indeed the only "meaningful" remedy which might be provided under these circumstances -- is an order that the Colorado Supreme Court admit plaintiff to the practice of law in this state.

In moving to dismiss, defendants contend, inter alia, that we, as a federal district court, lack jurisdiction over the claims asserted here and that we are

powerless to grant the relief which plaintiff seeks. We agree.

At the outset, it is important to draw a subtle but fundamental distinction between two types of claims which the frustrated bar applicant might bring to federal court. The first is a constitutional challenge to the state's general rules and regulations governing admissions to its bar. The second is a claim--based on constitutional or other grounds--that the state has unlawfully denied a particular application for admission. In his concurring opinion in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 247 (1957), Justice Frankfurter observed:

> Admission to practice in a State and before its courts necessarily belongs to that State. Of course, legislation laying down general conditions of an arbitrary or discriminatory character may, like other legislation, fall afoul of the Fourteenth Amendment. See Cummings v. Missouri, 4 Wall. 277. A very different question is presented when this Court is asked to review the exercise of judgment in refusing admission to the bar in an individual case, such as we have here.
>
> It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar. [Id. at 248 (emphasis added)]

This distinction is one grounded in sound principles of federalism and comity.[5] It is, moreover, a distinction to which federal courts have consistently adhered. [See especially, Keenan v. Board of Law Examiners of State of North Carolina, 317 F. Supp. 1350, 1356 (E.D.N.C. 1970) (three-judge court)]

Admittedly, federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys. [See, e.g., Goldsmith v. Pringle, ___ F. Supp. ___, No. 74-A-982 (D. Colo. Aug. 4, 1975) (three-judge court); Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont.) (three-judge court), aff'd mem., 419 U.S. 955 (1974); Brown v. Supreme Court of Virginia, 359 F. Supp. 549 (E.D. Va.) (three-judge court), aff'd mem., 414 U.S. 1034 (1973)] However, these are cases where either the rule-making authority of the state is challenged,[6] or the administration of some

5. We do not rest our decision herein on principles of res judicata or upon plaintiff's failure to "reserve" his federal claims during a state court proceeding. [See, e.g., Tang v. Appellate Division of New York Supreme Court, First Department, 487 F.2d 138, 142-43 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974) (res judicata); Roy v. Jones, 484 F.2d 96, 101 (3d Cir. 1973) ("reservation" of federal claims)]

6. This distinction is implicit to the Tenth Circuit Court of Appeals' decision in Rossiter v. The Law Committee of the State Board of Law Examiners, supra (slip opinion at p.2).

rule is attacked,[7] and not where review of a state court's adjudication of a particular application is sought. The latter claim may only be heard, if at all, by the Supreme Court of the United States. For example, in Arvelo v. Supreme Court of Puerto Rico, 382 F. Supp. 510 (D.P.R. 1974), the plaintiff wrote a message to the grader in the margin of his bar examination booklet. Since this constituted a breach of a rule promulgated by the Board of Bar Examiners, plaintiff was disqualified from the examination. He brought a §1983 action in federal district court, claiming that his disqualification violated both procedural and substantive guarantees of due process. In dismissing his claims for lack of jurisdiction, the court reasoned:

> In the instant case, plaintiff is not challenging the state bar admission requirements prescribed by court rule on constitutional grounds, he is merely claiming that defendants' actions and rulings are unconstitu-

7. For example, in Pacheco v. Pringle, Civil Action No. C-5219 (D. Colo. pending), a three-judge district court has exercised jurisdiction over plaintiff's claim that the Colorado bar examination results in de fact discrimination against minority applicants. Unlike the instant controversy, the plaintiff in Pacheco is not attacking the Colorado Supreme Court's judgment in a particular case. [See also, Vigil v. Pringle, Nos. 74-A-433, 74-A-440, 74-A-445 (D. Colo.)]

tional. Under such circumstances . . . this Court holds that the resolutions of the Supreme Court of Puerto Rico concerning plaintiff's disqualification may only be reviewed by the Supreme Court of the United States on certiorari. [Id. at 513 (emphasis added)]

This conclusion represents an application of the so-called "Theard doctrine" [see, Theard v. United States, 354 U.S. 278 (1957)] which has frequently been invoked by federal courts to dismiss claims brought against state licensing authorities by attorneys who have been, or are threatened with, disbarment or other disciplinary measures. [See, e.g., Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962)] As the court in MacKay v. Nesbett, 412 F.2d 846 (9th Cir.), cert. denied, 396 U.S. 960 (1969), held:

> [O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court. [Id.]

As is clear from his Complaint, plaintiff here is not challenging any rule or regulation governing admission to the Colorado bar; nor is he contesting the authority of defendants to exclude him, on "ethical or moral" grounds, from the practice of law in this state. Instead, he is charging that defendants acted unconstitutionally in denying his particular application. The constitutional infirmities which are alleged here rest not in the "legislation" or "administrative" acts

of the Colorado Supreme Court, but rather in the specific adjudication rendered by that court in plaintiff's case. Consequently, we lack jurisdiction over the subject matter of plaintiff's claims.

Having reached this conclusion, it is unnecessary to address defendants' other grounds for dismissal. It is, therefore,

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted and that plaintiff's cause of action and Complaint be, and the same hereby are, dismissed.

DATED at Denver, Colorado, this 20th day of August, 1975.

BY THE COURT:

/s/
ALFRED A. ARRAJ, Chief Judge
United States District Court

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action 75-A-384

JOHN DOE,

Plaintiff,

v.

E. E. PRINGLE, D. E. KELLEY, R. B. LEE, E. C. DAY, J. K. GROVES, P. V. HODGES, and W. H. ERICKSON, individually and in their offical capacities as Justices of the Colorado Supreme Court,

Defendants.

Messrs. Jonathon B. Chase, University of Colorado School of Law, Boulder, Colorado, and Albert T. Frantz, 7180 West 14th Avenue, Englewood, Colorado, for Plaintiff; Mr. J. D. MacFarlane, Attorney General, by Mr. Gene Lucero and Ms. Ruthanne Gartland, Assistants, 104 State Capitol, Denver, Colorado for Defendants.

SUPPLEMENTAL OPINION AND ORDER DENYING MOTION FOR REHEARING

ARRAJ, Chief Judge

Plaintiff seeks a Rehearing on the matters previously considered by this Court in its Memorandum Opinion and Order, granting defendants' Motion to Dismiss. Doe v. Pringle, Civil Action No. 75-A-384 (Aug. 20, 1975). It was there determined that the federal courts lacked original jurisdiction over a claim that the Colorado Supreme Court violated plaintiff's constitutional rights to due process and equal protection of the law in denying him admission to the Colorado bar. It is requested that the Court reconsider its determination, and assume jurisdiction over this action. The Court has carefully reconsidered its opinion, in light of authorities and arguments subsequently presented by plaintiff as well as those previously before the Court, but is unable to perceive any reason to alter its original decision.

The thrust of plaintiff's contention is that the Court erred in construing the actions of the Colorado Supreme Court denying him admission to the bar to be "judicial," rather than "administrative," and in holding that those actions are reviewable only by the Supreme Court of the United States upon the granting of a writ of certiorari. More specifically, plaintiff's position may be divided into three categories. It is first asserted that the act of denying an applicant the right to practice law in the state is "administrative" and thus is subject to attack in the federal courts as is any other administrative action which allegedly deprives one of equal protection

of the law. 42 U.S.C. §1983; 28 U.S.C. §1343(3).

It is next asserted that the decision of the Supreme Court in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), and particularly the concurring opinion of Mr. Justice Frankfurter, upon which this Court relied in reaching its previous decision, in fact dictate that the federal courts must take jurisdiction in these matters to adequately protect the constitutional rights of bar applicants. It has previously been asserted that the opinion in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) lends support to this contention.

The final claim of plaintiff is that the Court has misplaced its reliance on various cases which have denied jurisdiction over challenges to state court actions as here involved because those cases involved initial determinations by the state courts of the constitutional issues being presented to the federal court. It is therefore suggested that those decisions are based merely on notions of res judicata, and would have no bearing in this case since plaintiff has been studious to avoid presentation of any constitutional claims to the Colorado Supreme Court. The Court finds none of these contentions persuasive.

I.

In our previous opinion, it was pointed out that federal courts do take jurisdiction over many constitutional claims where either the rule-making authority of the state is challenged, or the "administration of some rule" is

attacked, but not where the state court's adjudication of a particular application is sought. The latter we held may only be heard, if at all, by the Supreme Court of the United States on writ of certiorari. Plaintiff contends that in fact the Colorado Supreme Court was "administering a rule," rather than performing a judicial function, when it denied plaintiff's application.

Admittedly, a state court is performing a "quasi-administrative" function when it denies an application for the practice of law, being similar to an administrative act, but done under judicial authority. Brooks v. Laws, 208 F.2d 18, 20 (C.A.D.C. 1953). Further, unlike disbarment proceedings, the determination is not reached through a process analagous to typical "judicial proceedings." Colo. R. Civ. P. 241-52. However, there is a vital distinction between the performance of the particular duties here in question by the highest court of a state and the usual activities of an administrative agency. The basis of that distinction lies in the inherent judicial nature of the task undertaken by a state court in determining to accept or exclude an applicant from the practice of law. The nature of that role has been no better explained than by Mr. Justice Field long ago in Ex Parte Garland, 4 Wall 333, 71 U.S. 333 (1866.) Speaking for the Supreme Court, Mr. Justice Field characterized the function of a court in granting or denying admission to the bar as follows:

> "Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution

for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. . . . 'Attorneys and counsellors . . . are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions.'" Ex Parte Garland, supra, 379. (emphasis added).

Plaintiff apparently misconstrues the intent of our previous reference to the existence of federal jurisdiction where "the administration of some rule is attacked." We were there careful to point out that the reference was to an attack upon bar examinations which were challenged as resulting in de facto discrimination. Pacheco v. Pringle, Civil Action No. C-5219 (D. Colo. pending). The attack in Pacheco, as in the other "rule-making" cases, is upon the constitutionality of a stated requirement, regulation or examination, whatever its nature, and not upon the actions taken by the highest court of the state in regard to a particular application, or in disbarment proceedings against a particular attorney.

In an attempt to distinguish the act of denying an applicant the right to practice law from the now admitted judicial nature of the act of disbarment, plaintiff asserts that since the State Supreme Court is not required to conduct "adjudicatory" proceedings in denying admission as employed in disbarment proceedings, Colo. R. Civ. P. 241-52, the denial must necessarily be an administrative act. The distinction is not determinative.

> "The act of admission is an exercise of judicial power, . . . a judgment . . . even though it is not considered a judicial proceeding." In re Summers, 325 U.S. 561, 565-66 n.6 (1945) (review by writ of certiorari).

Further, the rules of procedure which plaintiff cites expressly state that the Colorado Supreme Court has exclusive jurisdiction over both disbarment and licensing proceedings. Colo. R. Civ. P. 241C.

Even though the denial of a license to practice law is not the typical determination of legal issues or a review of previous factual determinations by others, it is nevertheless the final decision of the highest court of the State, and must be characterized as "judicial" in nature. MacKay v. Nesbett, 285 F. Supp. 498 (D.C. Alaska 1968). The proper avenue of appeal is pursuant to 28 U.S.C. §1257(3), by writ of certiorari.

II.

In his concurring opinion in Schware v. Board of Bar Examiners, 353 U.S. 232,

248 (1957), Mr. Justice Frankfurter noted that admission to practice in a State and before its courts necessarily belongs to that State. However, the Justice did concur in the majority's finding that the New Mexico Supreme Court had violated the applicant's right to due process in reaching its decision to exclude him from the practice of law. It is therefore contended that the concurring opinion necessarily dictates that the federal courts do in fact have jurisdiction to hear the claim of plaintiff in the present case. This is not disputed, but the opinion expressed by Mr. Justice Frankfurter supports no more than we have previously determined. The plaintiff does have a right to federal protection of his constitutional claims. However, the only procedure available to him to assert his constitutional challenge in the federal courts is to seek a writ of certiorari from the United States Supreme Court, as did the petitioner in Schware.

The contention that England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 416-17 (1964) indicates that plaintiff's constitutional rights can be adequately protected only through an initial federal court determination is without merit. In that case the petitioner had been remitted to state court for an interpretation of pertinent state statutes. It was not denied that there were independent federal claims which otherwise could be determined as an initial matter by the federal court. In fact, as noted by the Supreme Court, the success of the federal claims could well depend upon the original factual determinations of the federal district court.

> "Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination." England, supra, 417.

In the present case there is no similar right to an initial factual determination by this Court, for as already noted, that determination is within the exclusive jurisdiction of the Colorado Supreme Court. Even construing the state court's actions as an "administrative" determination, as plaintiff would have us do, it would seem that the right to review in any federal court would at best be limited to a determination of whether there were substantial evidence in the record to support the finding of the state court or whether its actions were arbitrary or capricious. Cf., Jones v. Institutional Classification Committee, Field Unit No. 8, 374 F. Supp. 706 (D.C. Vir. 1974); Carpenter v. City of Greenfield School District # 6, 358 F. Supp. 220 (D.C. Wis. 1973); Jaeger v. Stephens, 346 F. Supp. 1217 (D.C. Colo. 1971). The decision and dictum in England are therefore inapposite. Nor can we accept the contention that the remedy left to plaintiff is "inadequate," or that it leaves the state court "free from federal intervention to assure compliance with federal law." The Supreme Court has not been hesitant to review state court orders where petitioner makes a substantial allegation that licensing or disbarment proceedings violated the due process or equal protection clause of the Fourteenth Amendment. E.g., Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957); In re Pat-

terson, 353 U.S. 952, 77 S.Ct. 869, 1 L. Ed.2d 906 (1957), 356 U.S. 947, 78 S.Ct. 795, 2 L.Ed.2d 822 (1958); Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1957). It is to that Court which plaintiff must look for any federal protection of his constitutional rights.

III.

The Court relied in its previous decision on several cases, including the opinion of the Tenth Circuit in Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962), which have likewise held that the only remedy available to a bar applicant denied admission is to seek review from the Supreme Court via a writ of certiorari. Plaintiff asserts that the reliance was misplaced because those deicisions merely were following the ordinary rule of res judicata in refusing to consider constitutional issues already determined in the state court. Such an interpretation is supported by at least one federal district court. Lipman v. Van Zant, 329 F. Supp. 391 (D.C. Miss. 1971). In the present case plaintiff carefully avoided the presentation of his constitutional claims to the Colorado Supreme Court.

It is true that a great many cases cited by this Court were based on notions of res judicata to at least a partial extent. However, we expressly stated in our determination of this matter that the finding of lack of jurisdiction was not based on notions of res judicata or the failure to "reserve" the federal claims during the state court proceeding, but

rather rested at least in part on the broader notions of comity and federalism. Even if this Court otherwise could assume jurisdiction, deference to the highest court of the State of Colorado, whose actions have been characterized as a judicial determination, a final judgment, would lead us to leave plaintiff to his remedies in the United States Supreme Court on a writ of certiorari.

> "[T]he notion of 'comity,' that is, a proper respect for state functions, [is] a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

Nowhere is the importance of leaving a state free to perform its separate functions greater than where the highest court of that state exercises its judicial power to determine who will be allowed to practice the profession of law within its borders. This Court rejects plaintiff's contention that the refusal to assume jurisdiction is merely another way of saying that plaintiff's claim is barred by res judicata.

Nor can this Court accept the characterization of the Tenth Circuit's decision in Gately, supra, as one merely based on the ordinary rule of res judicata. The petitioner in Gately brought an action in federal district court requesting an order

directing that the Colorado Supreme Court set aside an order of disbarment, and requesting damages in the sum of $500,000. The petition was dismissed in the district court on the ground that jurisdiction was lacking to grant the relief requested. The Tenth Circuit affirmed.

The petitioner's claim was that the Colorado Supreme Court had denied him due process of law in the disbarment proceeding by refusing to receive certain evidence. Nowhere in the opinion is there any indication that the constitutional claim was ever considered by the state court. Even if the claim in Gately was in fact presented in the state court proceedings, there is no indication that the Tenth Circuit was aware of that fact in reaching its decision, or that it in any way considered it relevant to the finding of lack of jurisdiction. The decision is therefore controlling in the present case. To the extent that Lipman, supra, is inconsistent with this determination, we must respectfully disagree. See, Lenske v. Sercombe, 266 F. Supp. 609 (D.C. Ore. 1967). The plaintiff is not without remedy, but that remedy cannot be supplied by this Court. It is therefore

ORDERED that plaintiff's motion for rehearing be, and the same hereby is, denied.

DATED at Denver, Colorado, this 22nd day of September, 1975.

BY THE COURT:

/s/
ALFRED A. ARRAJ, Chief Judge
United States District Court

Appendix E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

JOHN DOE, Plaintiff, vs. E. E. PRINGLE, D. E. KELLEY, R. B. LEE, E. C. DAY, J. K. GROVES, P. V. HODGES, and W. H. ERICKSON, individually and in their official capacities as Justices of the Colorado Spreme Court, Defendants.	COMPLAINT

I. JURISDICTION

1. This is a civil action brought by plaintiff pursuant to 42 U.S.C. §1983 (1970), seeking a declaratory judgment: that the defendants, in rejecting the finding by the Bar Committee of the Colorado State Board of Law Examiners that plaintiff is presently qualified to practice law in the State of Colorado, violated their own rules, acted arbitrarily and capriciously, and, in so doing, denied plaintiff his right to due process of law guaranteed by the fourteenth amendment to the United States Constitution; that the defendants, in denying plaintiff's application for admission to practice law did so solely on the basis of his past felony conviction, thereby irrebuttably

presuming that plaintiff is not now qualified to counsel and advise others in the conduct of their affairs, contrary to facts already found by the Bar Committee, in violation of plaintiff's right to due process of law gauranteed by the fourteenth amendment to the United States Constitution; that the defendants, while denying plaintiff the right to engage in the practice of law by reason of his prior felony conviction, have permitted others convicted of similar crimes under similar circumstances to practice law, thereby denying plaintiff equal protection of the law guaranteed by the fourteenth amendment to the United States Constitution.

Plaintiff further seeks injunctive relief requiring defendants to set aside their denial of plaintiff's application for admission to the Bar of the State of Colorado, to accept the findings of the Bar Committee of the Colorado State Board of Law Examiners as to plaintiff's present qualifications to practice law, and to admit plaintiff to the Bar of the State of Colorado.

2. Jurisdiction is conferred upon this court by 28 U.S.C. §1343(3) (1970).

II. PARTIES

3. Plaintiff is a citizen of the United States and of the State of Colorado.

4. Defendants, E. E. Pringle, D. E. Kelley, R. B. Lee, E. C. Day, J. K. Groves, P. V. Hodges, and W. H. Erickson, are Justices of the Colorado Supreme

Court and, acting in their official capacities, possess "original and exclusive jurisdiction in all matters involving the licensing of persons to practice law" pursuant to Rule 241, Colo. R. Civ. P.

III. FIRST CLAIM FOR RELIEF

5. On March 13, 1971 John Doe, plaintiff in this action, pleaded guilty to the charge of violating 26 U.S.C. §4744(a) (being a transferee of marijuana without having obtained a permit and without having paid the special tax thereon) in the United States District Court at Tucson, Arizona, and was sentenced to the Federal Correctional Institution at La Tuna, Texas.

6. Having served his sentence, plaintiff, a graduate of the University of Utah School of Law, applied for admission to the Bar of Colorado. In February, 1973, having fully disclosed his status as a convicted felon, plaintiff was permitted to take the Colorado Bar examination, which he passed.

7. On February 27, 1973, Donald S. Stubbs, Warren L. Turner, and Russell P. Kramer, acting on behalf of the Bar Committee of the Colorado State Board of Law Examiners, held a personal interview with plaintiff. The scope of this interview was limited to consideration of matters contained in plaintiff's application for admission and whether there were any special circumstances excusing his commission of the felony so as to justify his admission to the Bar of the State of Colorado. The interview was thus limited to possible grounds for

excuse, and plaintiff was afforded no opportunity to establish his present fitness to practice law in Colorado. As a result of its interview with plaintiff, the Committee, apparently relying on Rule 212, Colo. R. Civ. P., which provides in relevant part that, "Conviction of felony . . . may be grounds for recommending that applicant be denied the right to practice law, unless special circumstances in the opinion of the Committee excuses the applicant," reported as follows:

March 1, 1973

Chief Justice Edward E. Pringle
Chief Justice, Colorado Supreme Court
State Capitol Building
Denver, Colorado 80202

Dear Justice Pringle:

We hand you herewith the application of John Doe, an applicant for admission to the Colorado Bar who is sitting for the examination this week.

You will note in answer to Question 10 on his Class C application that he pleaded guilty to the commission of a felony in 1970 and has served his sentence. The Committee has found, from its personal interview with the applicant on February 27, 1973, that he is not properly qualified for admission to the Colorado Bar since he has been convicted of a felony.

The Committee, from its interview

with the applicant, found no special circumstances which, in its opinion, excuses the applicant pursuant to C.R.C.P. 212, as amended.

Very truly yours,

/s/ Barnard Houtchens

A copy of this letter is attached to the Complaint as Appendix A.

8. On March 15, 1973, the Justices of the Supreme Court of Colorado voted unanimously in their en banc conference to approve the report and recommendation of the Committee with respect to the denial of plaintiff's application for admission to the Bar of the State of Colorado. (See Letter of March 15, 1973, from Chief Justice Pringle to Barnard Houtchens, attached hereto as Appendix B.)

9. On April 6, 1973, Justice James K. Groves, acting in his capacity as Chairman of the Colorado Supreme Court's Admission Committee, advised the plaintiff that the Court would not admit him to the practice of law in Colorado because he was not properly qualified for admission to the Bar by reason of his conviction of a felony under federal law. (See Letter of April 6, 1973 from Justice James K. Groves to John Doe, attached hereto as Appendix C.)

10. On January 15, 1974, plaintiff by counsel, requested that the Supreme Court of Colorado reopen his application for admission to the Bar and reconsider his present qualifications to counsel and advise others, notwithstanding his prior

felony conviction. (See Letter of January 15, 1974, from Albert T. Frantz and Jonathon B. Chase to Justice James K. Groves, attached hereto as Appendix D.)

11. On January 17, 1974, Justice James K. Groves requested of Mr. Barnard Houtchens, Chairman of the Bar Committee of the Colorado State Board of Law Examiners, that said Committee conduct a hearing to determine plaintiff's qualifications for admission to the Bar. (See Letter of January 17, 1974, from Justice James K. Groves to Barnard Houtchens, attached hereto as Appendix E.)

12. Pursuant to the request of Justice Groves, further hearings before the Bar Committee of the Colorado State Board of Law Examiners were held, which consisted of four meetings with plaintiff, held February 26, 1974, May 17, 1974, September 20, 1974, and December 2, 1974. A certified shorthand reporter was present at only one of the said meetings, that which was conducted on May 17, 1974. (See Letter of May 8, 1974, from Catharyn Ables to John Doe, attached hereto as Appendix F.) During the course of these hearings the Committee made extensive and exhaustive inquiries into the reasons for plaintiff's participation in the commission of the felony and all of the events related thereto. Further, the Committee inquired into plaintiff's activities from the time he was sentenced until present and discussed with plaintiff his present goals and aspirations and otherwise investigated plaintiff's present moral qualifications to practice law. On the basis of such investigations and inquiries, and, on the basis of personal evaluations of

plaintiff's character, based on his statements, attitude, demeanor and sincerity, the Committee made a factual determination that plaintiff had been rehabilitated and was presently fit to practice law in Colorado.

13. On December 2, 1974, the Bar Committee found plaintiff to be presently qualified to practice law in the State of Colorado, and submitted its findings, recommendation, and plaintiff's application for admission to the Bar to the Colorado Supreme Court. (See Certificate of Bar Committee of December 2, 1974, signed by Barnard Houtchens, Donald S. Stubbs, Warren L. Turner, Jacob L. Sherman, and Roger Cisneros, attached hereto as Appendix G; Memorandum of January 7, 1975, from C. Ables to Justice Groves, attached hereto as Appendix H; Memo to File of December 2, 1974, attached hereto as Appendix I; and Application of John Doe for Admission to the Bar, attached hereto as Appendix J.)

14. On January 10, 1975, Justice William H. Erickson of the Colorado Supreme Court, advised plaintiff that the Court would not admit him to the practice of law in the State of Colorado. (See Letter of January 10, 1975, from Justice William H. Erickson to John Doe, attached hereto as Appendix K.)

15. On February 27, 1975, attorneys for plaintiff, in a letter to Chief Justice Pringle of the Colorado Supreme Court, requested verification of counsel's construction of the hearing, clarification of the procedures available to plaintiff by which plaintiff could demonstrate his present moral fitness to practice law.

(See Letter of February 27, 1975, from Albert T. Frantz and Jonathon B. Chase to Chief Justice Edward E. Pringle, attached hereto as Appendix L.) In response thereto, on March 11, 1975, Justice Pringle indicated that all hearing procedures available to plaintiff had been utilized. (See Letter of March 11, 1975, from Chief Justice Pringle to Albert T. Frantz, attached hereto as Appendix M.)

16. Rule 217 of the Colorado Rules of Civil Procedure provides:

> No applicant will be refused admission by reason of any ethical or moral disqualification without an opportunity to be heard. Hearings shall be had before the Court en banc, or otherwise as the Court shall direct.

Pursuant to Rule 217, Colo. R. Civ. P., plaintiff may not be denied admission to the Bar on grounds of moral disqualification without being afforded a hearing. Pursuant to that Rule, the defendants had the option of holding the hearing themselves or of delegating that responsibility to some other person or body. As indicated by Justice Pringle's confirmation of plaintiff's counsel's understanding of the procedures used in this case, see Appendices L and M, defendants chose to delegate the Rule 217 hearing to the Bar Committee. Having so delegated that hearing to the Bar Committee, the defendants are bound by the factual determination reached as a result of said hearing. The defendants, by thus refusing to accept the findings of the Bar Committee have failed to follow their own rules and have denied plaintiff his right to due process

as protected by the fourteenth amendment to the United States Constitution.

IV. SECOND CLAIM FOR RELIEF

17. Plaintiff restates and realleges paragraphs 1 through 16 as if fully set out herein.

18. On information and belief, defendants have never before rejected a favorable recommendation of the Bar Committee, have rejected the recommendation in this case without any factual basis therefor and have thus acted arbitrarily and capriciously in violation of the plaintiff's right to due process of law guaranteed by the fourteenth amendment to the United States Constitution.

V. THIRD CLAIM FOR RELIEF

19. Plaintiff restates and realleges paragraphs 1 through 18 as if fully set out herein.

20. On February 19, 1975, a meeting took place between counsel for plaintiff and Chief Justice Pringle of the Colorado Supreme Court. Chief Justice Pringle stated that with respect to plaintiff's application for admission to the Bar, the Court had considered the Certificate of the Bar Committee, the Memorandum from C. Ables to Justice Groves, the Memo to File, and the Application of John Doe for Admission to the Bar (attached hereto as Appendices G, H, I, and J, respectively), and no other documents or records. In rejecting the finding of the Bar Committee, Justice Pringle stated that the Court

acted out of its belief that a person committing the crime committed by defendant during his third year of law school could not be morally qualified to practice law.

21. To the extent that the Colorado Supreme Court based its decision solely on the fact that plaintiff had been convicted in the past of a felony, the Court has conclusively presumed from the fact of his past conviction that he is not presently qualified, contrary to the facts already found by the Bar Committee, and has thus deprived plaintiff of his right to due process as guaranteed by the fourteenth amendment to the United States Constitution.

VI. FOURTH CLAIM FOR RELIEF

22. Plaintiff restates and realleges paragraphs 1 through 21 as if fully set out herein.

23. On information and belief, others who have been convicted of felonies similar in nature to that committed by plaintiff and at or about the same stage of their professional careers have been admitted to the practice of law in the State of Colorado.

24. The defendants, by permitting some such convicted felons to be admitted to practice law, while denying such admission to the plaintiff, have discriminated against the plaintiff in contravention of his right to equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution.

VII. PRAYER

WHEREFORE, plaintiff respectfully prays for the following relief:

1. A declaratory judgment that the defendants have unlawfully excluded the plaintiff from the practice of law in Colorado by depriving him of due process of law and of the equal protection of the laws;

2. A permanent injunction that,

(a) sets aside the action taken by the defendants on January 10, 1975, in denying plaintiff's application for admission to the Bar of the State of Colorado;

(b) requires the defendants to accept the findings of the Bar Committee of the Colorado State Board of Law Examiners as to the present qualification to practice law and admit the plaintiff to the Bar of the State of Colorado; and

3. For costs of this suit and such other and further relief as the Court may deem equitable and proper.

Respectfully submitted,

/s/ Albert T. Frantz
7180 West 14th Avenue
Englewood, Colorado
237-5415

/s/ Jonathon B. Chase
University of Colorado
School of Law
Boulder, Colorado
492-8428
ATTORNEYS FOR PLAINTIFF

Appendix A to Complaint

March 1, 1973

Chief Justice Edward E. Pringle
Chief Justice, Colorado Supreme Court
State Capitol Building
Denver, Colorado 80202

Dear Justice Pringle:

We hand you herewith the application of John Doe, an applicant for admission to the Colorado Bar who is sitting for the examination this week.

You will note in answer to Question 10 on his Class C application that he pleaded guilty to the commission of a felony in 1970 and has served his sentence. The Committee has found, from its personal interview with the applicant on February 27, 1973, that he is not properly qualified for admission to the Colorado Bar since he has been convicted of a felony.

The Committee, from its interview with the applicant, found no special circumstances which, in its opinion, excuses the applicant pursuant to C.R.C.P. 212, as amended.

Very truly yours,

/s/ Barnard Houtchens

BH/h

Appendix B to Complaint

March 15, 1973

Barnard Houtchens, Esq.
Attorney at Law
1007 Ninth Avenue
Greeley, Colorado 80631

Dear Mr. Houtchens:

We have your letter concerning the report of the Bar Committee's action with respect to John Doe, who is an applicant for admission to the Colorado Bar.

This matter was discussed in the En Banc conference this morning and the Court voted unanimously to approve the report and recommendation of the Committee.

Best personal regards.

Sincerely,

/s/ EDWARD E. PRINGLE

EEP:hea

Appendix C to Complaint

April 6, 1973

Mr. John Doe
Address
City, State

Dear Mr. Doe:

I write in my capacity as Chairman of the Court's Admission Committee.

We are advised that in 1970 you pled guilty to the commission of a felony, and that you have served your sentence. You were permitted, however, to take our February 1973 bar examination.

The Bar Committee of the Colorado State Board of Law Examiners has advised us that you are not properly qualified for admission to the Bar by reason of this conviction. The members of this Court agree, and you are advised that you will not be admitted to practice law by this Court. The Court further ordered that the fee which you paid should be returned to you, and you will receive a check from the Secretary of the Colorado State Board of Law Examiners.

Cordially yours,

/s/ James K. Groves

JKG:sh
cc - The Chief Justice
Chairman, Bar Committee
Secretary, Colorado State Board of Law Examiners

Appendix D to Complaint

January 15, 1974

Justice James K. Groves
Chairman, Supreme Court
Committee on Admission to the Bar
of the State of Colorado
Capitol Building
Denver, Colorado 80203

Dear Justice Groves:

Pursuant to our recent telephone conversation, we are writing to request that the Application of John Doe for Admission to the Bar be reopened and referred back to the Bar Committee of the Colorado State Board of Law Examiners in order to afford Applicant an opportunity to demonstrate, pursuant to Rule 212, Colo. R. Civ. P., that he is presently qualified to counsel and advise others in the conduct of their affairs, notwithstanding his prior felony conviction.

Since the Bar Committee will be soon convening in order to review applications for the March Bar examination, we would request that the hearing be scheduled during that period.

Thank you very much for your consideration and cooperation in this matter.

Sincerely,

/s/ Albert T. Frantz
Attorney at Law

/s/ Jonathon B. Chase
Associate Professor of Law

Appendix E to Complaint

January 17, 1974

Barnard Houtchens, Esquire
Chairman, Bar Committee of
Colorado State Board of Law Examiners
1007 Ninth Avenue
Greeley, Colorado 80631

Re: John Doe

Dear Mr. Houtchens:

Enclosed is a copy of a communication addressed by me by Albert T. Frantz and Jonathon B. Chase under date of January 15, 1974.

The court requests that you give Mr. Doe a further hearing. If you think you will have enough time for this on February 26th, please advise as to the hour. If not, you can set it down for your next meeting.

Messrs. Frantz and Chase have thought that there was a good possibility that you interpreted C.R.C.P. 212 as requiring a mandatory recommendation not to admit a person who had been convicted of a felony. The court wanted you to know that it regards this as a discretionary matter, and in talking to you today I have found that you and your Committee members regard it as discretionary.

The court had no opinion as to what your recommendations should be after further hearing.

Sincerely yours,

/s/ James K. Groves

Appendix G to Complaint

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

In the Matter of
the Application of
JOHN DOE
For Admission to
the Bar.

CERTIFICATE OF BAR COMMITTEE

TO THE HONORABLE SUPREME COURT OF THE STATE OF COLORADO.

Gentlemen: The undersigned members of your Bar Committee do respectfully certify that we have considered the proofs submitted of the ethical and moral qualifications and have inquired into the character of JOHN DOE, applicant for admission to the Bar of the Supreme Court of the State of Colorado; that said applicant has been personally interviewed by the undersigned and we find said applicant is properly qualified for such admission.

Dated, Denver, Colorado, December 2, 1974.

/s/ Barnard Houtchens
/s/ Donald S. Stubbs
/s/ Warren L. Turner
/s/ Jacob L. Sherman
/s/ Roger Cisneros

Appendix K to Complaint

William H. Erickson
Justice
Supreme Court
State of Colorado
State Capitol Building
Denver, CO 80203

January 10, 1975

PERSONAL AND CONFIDENTIAL

Mr. John S. Doe:
c/o Jonathon B. Chase, Esq.
905 Lincoln Place
Boulder, Colorado 80302

Dear Mr. Doe:

The Court has considered your application for admission and on the basis of the proofs submitted on your ethical and moral qualifications, has denied your application.

Very truly yours,

/s/ William H. Erickson

WHE/ca

Appendix L to Complaint

February 27, 1975

Honorable Edward E. Pringle
Chief Justice, Colorado Supreme Court
State Capitol Building
Denver, Colorado 80203

Re: Application of John Doe

Dear Justice Pringle:

In reviewing the various proceedings which culminated on January 10, 1975, in the denail of the application of John Doe for admission to the practice of law in the State of Colorado, counsel for Mr. Doe are somewhat uncertain as to the application of Rule 217, C.R.C.P., which provides in relevant part, as follows:

> No applicant will be refused admission by reason of any ethical or moral disqualification without an opportunity to be heard. Hearing shall be had before the Court en banc, or otherwise as the Court shall direct.

As the Court will recall, when Mr. Doe's application for admission was first denied, in 1973, counsel requested of the Court, through Justice Groves, Chairman of the Supreme Court Committee on Admission to the Bar, that Mr. Doe be given an opportunity to demonstrate his present fitness to practice, notwithstanding his prior felony conviction. Thereafter, in a letter dated January 17, 1974, to Barnard Houtchens, Chairman of the Bar Committee, Justice Groves requested the Bar Committee to provide Mr. Doe a further hearing.

Pursuant to that request, extensive hearings were held resulting in the Bar Committee's favorable recommendation to the Court dated December 2, 1974.

It is counsel's construction of the hearings held pursuant to the request of Justice Groves that such constituted a "[h]earing. . . otherwise as the Court shall direct," within the meaning of Rule 217. If we are correct, then Mr. Doe is entitled to no further hearings and has exhausted his available remedies. If, however, we are incorrect, and Mr. Doe is entitled to a further hearing then please consider this letter a request that such hearing be provided to Mr. Doe in order that he might present evidence on his behalf to demonstrate his present qualifications to engage in the practice of law.

Sincerely,

/s/ Albert T. Frantz
Attorney at Law

/s/ Jonathon B. Chase
Attorney at Law

Appendix M to Complaint

Supreme Court
State of Colorado
Denver

March 11, 1975

Edward E. Pringle
Chief Justice

Albert T. Frantz, Esq.
Attorney at Law
7180 West 14th Avenue
Denver, Colorado 80215

Dear Judge Frantz:

In response to your letter of February 27, 1975, please be advised that your conclusion is indeed correct and that Mr. Doe has exhausted his available remedies in the Colorado Supreme Court.

Sincerely,

/s/ EDWARD E. PRINGLE

EEP:hea

Supreme Court, U. S.
FILED
APR 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1330

John Doe,

Petitioner,

v.

E. E. Pringle, D. E. Kelley, R. E. Lee, J. R. Carrigan, J. K. Groves, P. V. Hodges, and W. H. Erickson, individually and in their capacities as Justices of the Colorado Supreme Court,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORATI

JONATHON B. CHASE
University of Colorado
School of Law
Boulder, CO 80309
(303) 492-8428
COUNSEL FOR PETITIONER

OF COUNSEL:
Albert T. Frantz
7180 West 14th Ave.
Englewood, Colorado

In The

Supreme Court of the United States

No. 76-1330

JOHN DOE,

Petitioner,

v.

E. E. PRINGLE, D. E. KELLEY, R. E. LEE, J. R. CARRIGAN, J. K. GROVES, P. V. HODGES, and W. H. ERICKSON, individually and in their capacities as Justices of the Colorado Supreme Court,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner, pursuant to Rule 24 of the Supreme Court Rules, hereby files his Supplemental Brief In Support of his Petition For Writ of Certiorari in order to call the attention of the Court to the case of Getty v. Reed, 547 F.2d 971 (6th Cir. 1977), the report of which was not available for inclusion in the Petition For Writ of Certiorari, docketed on March 26, 1977.

THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT IN GETTY V. REED, 547 F.2d 971 (1977).

Getty v. Reed, 547 F.2d 971 (6th Cir. 1977), involved appeals from two federal district court decisions denying subject matter jurisdiction over suits brought pursuant to 42 U.S.C. §1983 (1970) to enjoin the imposition of discipline by the then Kentucky Court of Appeals. In Collis v. Reed, 413 F. Supp. 507 (E.D.Ky. 1976), plaintiff claimed that the rules used in the proceedings culminating in his disbarment were unconstitutional. In Getty v. Reed, 413 F. Supp. 511 (E.D.Ky. 1976), in addition to challenging the rules, plaintiff also claimed that the conduct which was the basis for his suspension was speech protected under the first and fourteenth amendments. In both cases, specifically because these federal issues had been presented to and rejected by the Kentucky Court of Appeals, the federal district court found that it lacked subject matter jurisdiction under Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), since plaintiffs were essentially attempting to relitigate in federal court issues already passed upon on the merits in state court. 413 F. Supp. at 509-10, 514-15. The district court in both cases also relied on Tang v. Appellate Division of the New York Supreme Court, First Department, 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974), discussed in the Petition for Writ of Certiorari, at 17-21.

On appeal the United States Court of Appeals for the Sixth Circuit rejected the determination of the federal district court and found subject matter jurisdiction in both cases. It nevertheless affirmed dismissal of Collis since the procedures challenged had previously been upheld on the merits in another Sixth Circuit decision. The decision in Getty, however, was reversed, since, in addition to challenging the rules, Getty had also raised a first amendment claim.

In reversing the decision of the district court, the Sixth Circuit, 547 F.2d at 976, distinguished Rooker v. Fidelity Trust Co., supra, and found, 547 F.2d at 975, the decision of Judge Oakes, dissenting in Tang v. Appellate Division of The Supreme Court, First Department, supra, most persuasive. On remand, in addition to considering the merits of Getty's first amendment claims, the district court can also entertain a plea of res judicata if raised by defendants as an affirmative defense. See 547 F.2d at 975.

Although the decision of the Sixth Circuit in Getty is directly contrary to the decision of the Tenth Circuit in the case at bar, it also goes substantially further in finding subject matter jurisdiction than Petitioner has urged herein. As indicated in his Petition for Writ of Certiorari, at 14-16, 17-21, Petitioner has been willing to concede that presenting federal claims to a state court will thereafter preclude seeking collateral review of their rejection in a federal district court, at least where the choice of forum in which to litigate the federal issues was actually selected by the person asserting the federal claims, as the majority construed the actions of the plain-

tiff in Tang v. Appellate Division of the Supreme Court, First Department, supra. Compare Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974).

Notwithstanding the fact that Getty may go too far in asserting the existence of subject matter jurisdiction in cases seeking federal review of state court supervision of the practice of law, the conflict between the Sixth and Tenth Circuits on this issue underscores the recognition in Getty for the need for Supreme Court clarification in this area. The court in Getty noted, at 975, as follows:

> If what we have said thus far suggests that the District Judge who held he had "no jurisdiction" to try this case simply missed the signs on a well marked trial [sic], we hasten to acknowledge that no such thing is true. One commentator . . . has noted that the Supreme Court has given no guidance as to claim preclusion by final state court decision in §1983 cases and added that as a result "The decisions of the lower courts teem with inconsistencies." . . . Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Nw.U.L.Rev. 859, 865-66 & n. 35 (1976).

For the reasons above-stated and those previously asserted in the Petition For Writ of Certiorari, Petitioner respectfully requests the Court to grant his Petition For Writ of Certiorari.

Respectfully submitted,

Jonathon B. Chase
University of Colorado
School of Law
Boulder, CO 80309
COUNSEL FOR PETITIONER

OF COUNSEL:

Albert T. Frantz
7180 West 14th Avenue
Englewood, Colorado

Supreme Court, U. S.
FILED
MAY 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1330

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Petitioner,

v.

E. E. Pringle, D. E. Kelley, R. E. Lee, J. R. Carrigan, J. K. Groves, P. V. Hodges, and W. H. Erickson, individually and in their capacities as Justices of the Colorado Supreme Court,

Respondents.

FURTHER SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JONATHON B. CHASE
University of Colorado
School of Law
Boulder, CO 80309
(303) 492-8428
COUNSEL FOR PETITIONER

OF COUNSEL:
Albert T. Frantz
7180 West 14th Ave.
Englewood, Colorado

In The

Supreme Court of the United States

No. 76-1330

JOHN DOE,

Petitioner,

v.

E. E. PRINGLE, D. E. KELLEY, R. E. LEE, J. R. CARRIGAN, J. K. GROVES, P. V. HODGES, AND W. H. ERICKSON, individually and in their capacities as Justices of the Colorado Supreme Court,

Respondents.

FURTHER SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner, pursuant to Rule 24 of the Supreme Court Rules, hereby files a Further Supplemental Brief In Support of his Petition For Writ of Certiorari in order to call the attention of the Court to the case of Ktsanes v. Underwood, 45 L.W. 2477 (7th Cir. March 23, 1977), the report of which was not available for inclusion in the Petition For Writ of Certiorari, docketed on March 26, 1977.

THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN KTSANES V. UNDERWOOD, 45 L.W. 2477 (March 23, 1977).

Counsel for Petitioner has not yet had an opportunity to read the full opinion in the case of Ktsanes v. Underwood, 45 L.W. 2477 (7th Cir. March 23, 1977), having received the abridged report contained in Law Week on the date of preparation of this Supplemental Brief. Because of the importance of the decision of Ktsanes to resolution of the issues presented in this Petition, and because the Petition is now at issue, Respondents' Brief In Opposition to Petition For Writ of Certiorari having been filed,* Petitioner has chosen to bring the Ktsanes decision to the Court's attention immediately.

The brief account of the Court's decision in Ktsanes indicates that it is in direct conflict with the decision of Judge Barrett, writing for the court below in the case at bar, in which Judge Barrett relied on In re Summers, 325 U.S. 561 (1945), in rejecting Petitioner's claim that denial of an application for admission, albeit an exercise of judicial power,

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* Because of some inexplicable delay in the mails, Petitioner has not yet received a copy of Respondents' Brief In Opposition to Petition For Writ of Certiorari.

is a quasi-administrative proceeding rather than a traditional judicial proceeding. Appendix A to the Petition For Writ Certiorari, at 33; see id. at 47 ("The action of the Colorado Court was judicial rather than administrative.") (Breitenstein, J., concurring in result). The decision in Ktsanes is, further, in direct support of the position asserted by Petitioner in his Petition for Writ of Certiorari, at 20-21.

In one respect the Ktsanes case is consistent with the decision of the Tenth Circuit in the case at bar. The court below did recognize that a federal district court would have jurisdiction to hear a constitutional challenge to the adoption of an explicit court rule, Appendix A, at 34; and the issue in Ktsanes was whether a Rule of the Illinois Supreme Court was, on its face, unconstitutional. Thus, had plaintiff gone directly to federal district court, without submitting his application for admission to the Illinois Supreme Court, the Tenth Circuit would presumably agree that the federal district court would have jurisdiction to hear the case. What is of particular significance in Ktsanes is that such was not the course chosen by the plaintiff in that case. Rather than proceed directly in federal court, plaintiff first submitted his application to the Illinois Supreme Court, seeking an exemption from the rule; and his application was denied. Thereafter plaintiff brought his federal action, in which he challenged the constitutionality of the denial of his application. In upholding the jurisdiction of the federal district court to hear the case, the Seventh Circuit

in Ktsanes rejected the very same arguments made and found persuasive thus far in the case at bar, necessarily including the proposition that the district court "is without subject matter jurisdiction to review a final order of the Colorado Supreme Court denying a particular application for admission to the Colorado Bar." Appendix A, at 34 (emphasis in original).

For the reasons above-stated and those previously asserted in the Petition For Writ of Certiorari and the Supplemental Brief In Support of Petition For Writ of Certiorari, Petitioner respectfully requests the Court to grant his Petition For Writ of Certiorari.

Respectfully submitted,

Jonathon B. Chase
University of Colorado
School of Law
Boulder, CO 80309
COUNSEL FOR PETITIONER

OF COUNSEL:

Albert T. Frantz
7180 West 14th Avenue
Englewood, Colorado

Supreme Court, U. S.
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No. 76-1330

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

JOHN DOE,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

J. D. McFARLANE
Attorney General of Colorado

JEAN E. DUBOFSKY
Deputy Attorney General

EDWARD G. DONOVAN
Solicitor General

MARY J. MULLARKEY
First Assistant Attorney General

Attorneys for Respondents

1525 Sherman Street, Rm. 306
Denver, Colorado 80203
Telephone: 892-3611

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No. 76-1330

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

JOHN DOE, Petitioner, v. E. E. PRINGLE, D. E. KELLEY, R. E. LEE, J. R. CARRIGAN, J. K. GROVES, P. V. HODGES, and W. H. ERICKSON, individually and in their capacities as Justices of the Colorado Supreme Court, Respondents.	On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The two opinions of the district court are appended to the petition for certiorari as Appendices C and D. The opinion of the United States Court of Appeals for the Tenth Circuit and its order denying rehearing are appended to the petition for certiorari as Appendices A and B. The opinions below are not reported.

JURISDICTION

The petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1245(1).

QUESTION PRESENTED

Does the federal district court have jurisdiction to review the decision of the Colorado Supreme Court that the petitioner should not be admitted to practice law in Colorado because he is morally and ethically unqualified?

STATUTES INVOLVED

The petitioner sets forth the relevant federal statutes at 3 of the petition.

STATEMENT OF THE CASE

John Doe, the petitioner, is an unsuccessful applicant for admission to the Colorado bar who brought this action pursuant to 42 U.S.C. § 1983 in federal district court seeking to compel the Colorado Supreme Court to admit him to the practice of law. The federal district court granted the respondents' motion to dismiss the complaint for lack of subject matter jurisdiction and the United States Court of Appeals for the Tenth Circuit affirmed.

Doe was denied admission to the bar because the supreme court found, in two separate orders issued on April 6, 1973 and January 10, 1975, that he was not morally and ethically qualified to practice law. In July, 1970, while he was a third year law student, Doe was arrested in Arizona for illegally importing approximately 420 pounds of marijuana into the state from Mexico. Doe, who was 29 years old at the time, was the pilot of the single engine Cessna

airplane in which the marijuana was found. *See* Complaint, App. J.[1] The airplane's American identification designation had been taped over to look like a Mexican designation, and the Border Patrol apprehended Doe and his companion as they were attempting to remove the tape. Doe resisted arrest and attempted to flee before finally submitting. Two .22 caliber revolvers, which Doe said he and his companion had taken with them for protection in Mexico, were found in the airplane. *See* Complaint, App. H.

After his arrest, Doe completed law school in January, 1971 and, on February 3, 1971, he pleaded guilty to charges of being a transferee of marijuana and failing to pay the required transfer tax. He was sentenced to a two year prison term in a federal correctional institution and was released on August 25, 1972 (Complaint, App. J).

About four months after his release from prison, Doe applied for admission to the bar in December, 1972. He took and passed the February, 1973 bar examination. In accordance with established procedure, the Bar Committee of the Board of Law Examiners interviewed Doe for the purpose of evaluating his moral and ethical qualifications. Doe attempted to explain his participation in the crime on the ground that he was doing a favor to a friend who had saved his life in a skydiving accident (Complaint, App. H). Following the interview, the Bar Committee recommended to the supreme court that Doe not be admitted to practice. The committee found that he was not morally and ethically

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[1] The petition for certiorari contains the complaint and only certain "selected appendices." The petitioner has not included either Appendix J (Doe's application for admission to the Colorado Bar) or Appendix H (Memorandum dated June 7, 1975 from Catharyn Ables, Secretary to the Board of Law Examiners, to Justice Groves transmitting the Bar Committee's file on Doe to the court). References to these appendices in this brief are made to Complaint, App. J or Complaint, App. H.

qualified because of his recent felony conviction and the lack of any special circumstances excusing his conduct (Petition at 84). The supreme court unanimously adopted the committee's recommendation and, on April 6, 1973, advised Doe that he would not be admitted because he was not properly qualified (Petition at 86).

No further action was taken on Doe's application for admission until about nine months later when, on January 15, 1974, counsel for Doe requested that the supreme court reopen his case so that he could demonstrate his current fitness to practice (Petition at 87). The supreme court granted Doe's request and directed the Bar Committee to hold additional hearings (Petition at 88). The committee reconsidered Doe's case at four meetings with Doe and his attorneys on February 26, May 17, September 20 and December 2, 1974 (Complaint, App. H). As part of its deliberations, the committee obtained copies of the sentencing report and suppression hearing connected with Doe's criminal conviction.

After the hearings, the committee transmitted its entire file on John Doe to the supreme court (Complaint, App. H) along with its recommendation that he be admitted to practice (Petition at 89). Without dissent, the supreme court rejected the committee's recommendation and, on January 10, 1975, advised Doe that his application had been denied "on the basis of the proofs submitted on your ethical and moral qualifications." (Petition at 90).

The petitioner did not petition for rehearing in the Colorado Supreme Court or pursue any other remedy in the state courts, nor did he seek to review the state supreme court's action by writ of certiorari to this Court. Rather, he filed the present action in the federal district court on April 15, 1975.

ARGUMENT

I.

THE DECISION BELOW PROPERLY APPLIED THE *THEARD* DOCTRINE IN CONCLUDING THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION.

This case presents no novel or significant legal issue for this Court to consider. Involved is simply the application of a well-established principle, referred to by the courts below as the *Theard* doctrine, to the particular circumstances of this case.

The *Theard* doctrine is derived from *Theard* v. *United States*, 354 U.S. 278 (1957), and from *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) and *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957). Briefly stated, the *Theard* doctrine draws what the district court below termed a "subtle but fundamental distinction" between an action challenging the constitutionality of a statute or rule regulating bar admission and an action seeking to review the state court's judgment in refusing to admit an individual applicant. Petition at 57; *Schware* v. *Board of Bar Examiners of New Mexico, supra*, 353 U.S. at 248 (Frankfurter, J., concurring). In the latter category of cases, the federal district court does not have jurisdiction to review the state court's decision and the disappointed applicant, like the petitioners in *Schware* and *Konigsberg*, must seek review by petitioning this Court for a writ of certiorari to the state court. *See also Willner* v. *Committee on Character*, 373 U.S. 96 (1963).

Numerous lower federal court decisions have made the same distinction relied on by the courts below in this case.[2] The statement made by the Ninth Circuit Court of Appeals is representative:

> [O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems. We are persuaded that it [the rule] is sound.

MacKay v. *Nesbett*, 412 F.2d 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

In this case the court properly determined that Doe's complaint did not challenge the constitutionality of any statute or rule. Doe asserted four claims for relief: (1) that the court violated its own rule (Colo. R. Civ. P. 217) by failing to accept the certification of the Bar Committee that Doe was qualified for admission, thus denying him due process of law under the fourteenth amendment to the United States Constitution; (2) that the court rejected the Bar Committee's recommendation without any factual

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[2]*See e.g.*, Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962); MacKay v. Nesbett, 285 F. Supp. 498 (D. Alaska 1968), *aff'd*, 412 F.2d 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); Ginger v. Circuit Court, 372 F.2d 621 (6th Cir. 1967), *cert. denied*, 387 U.S. 935 (1967); Jones v. Hulse, 391 F.2d 198, 202 (8th Cir. 1968), *cert. denied*, 393 U.S. 889 (1968); Arvelo v. Supreme Court of Puerto Rico, 382 F. Supp. 510 (D.P.R. 1974); Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971).

basis, and that its action was thus arbitrary and capricious and a denial of due process; (3) that the court conclusively presumed that, because of his felony conviction, Doe was unqualified to practice law, thus denying him due process; and (4) that the court denied Doe's application, while it had admitted others who had been convicted of similr crimes, thus denying him the equal protection of the law as guaranteed by the fourteenth amendment to the United States Constitution.

In concluding that the district court lacked subject matter jurisdiction, the court of appeals stated:

> We concur in the district court's finding that it is without subject matter jurisdiction to review a final order of the Colorado Supreme Court denying a *particular application for admission* to the Colorado Bar. This rule applies even though, as here, the challenge is anchored to alleged depri ations of federally protected due process and equal protection rights. The court did not err in distinguishing the above rule from the rule that a federal district court may exercise jurisdiction in relation to review of alleged federal constitutional due process or equal protection deprivations in the state's adoption and/or administration of general rules and regulations governing admission. The district court properly invoked the "Theard Doctrine."

Petition at 34 (emphasis in original).

The district court also stressed:

> [*R*]*eview* of a state court's *adjudication* of a particular application . . . may only be heard, if at all, by the Supreme Court of the United States.

Petition at 59 (emphasis in original).

The petitioner, however, attempts to avoid the application of the *Theard* doctrine by contending that he had no opportunity to present his constitutional claims to the Colorado Supreme Court. Petition at 22-24. This argument, of course, ignores the fact that the petitioner made no effort to raise those issues in the state supreme court. The respondents maintained below, and again assert, that Doe could have filed a petition for rehearing and his claims would have been considered. As evidence that this course of action was available to the petitioner, the respondents point to the fact that Doe sought and obtained rehearing several months after the court first denied his application for admission.

Doe's decision not to raise his constitutional issues in the state court was a tactical error resulting from his mistaken assumption that he had a choice of forum. Because he sought only to reverse the decision in his own case (*see* plaintiff's prayer for relief, Petition at 83), Doe did not, and could not, invoke the jurisdiction of the federal district court. Accordingly, the decisions below were clearly correct.

II.

THERE IS NO CONFLICT OF DECISION.

The petitioner asserts that the decision in the present case conflicts with *Mildner* v. *Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901 (1976) and with the rationale of *Tang* v. *Appellate Division of the New York Supreme Court, First Department*, 487 F.2d 138 (2d Cir. 1973, *cert. denied*, 416 U.S. 906 (1974). Neither contention has merit.

Mildner v. *Gulotta*, *supra*, involved two types of claims for relief. The first was a challenge by all three plaintiffs

to the constitutionality of § 90 of the New York Judiciary Law. The *Mildner* court held that it had subject matter jurisdiction over this claim but ruled against the plaintiffs and upheld the constitutionality of the statute. 405 F. Supp. at 184-185.

The second type of claim in *Mildner* involved an attack by two of the plaintiffs on the propriety of the disciplinary actions imposed on them. With respect to these claims, the federal court held that it had no jurisdiction and that the plaintiffs' exclusive remedy was to seek review in the United States Supreme Court. *Id.* at 196.

The distinction drawn by the *Mildner* court between the two types of claims is the same distinction drawn by the district court below and approved by the Tenth Circuit. Thus, there is no conflict.

Like *Mildner*, the *Tang* case also involved an attack on the constitutionality of a rule governing admission to practice law in New York, *i.e.*, New York CPLR 9406(3), which required that an applicant for admission be an actual resident of New York for six months. *Tang* v. *Appellate Division of the New York Supreme Court First Department*, 373 F. Supp. 800 (S.D.N.Y. 1972). The district court held that no substantial federal question was presented requiring the convening of a three-judge court and concluded that "the six months' durational requirement is clearly reasonable." 373 F. Supp. at 801, 802.

On appeal, the Second Circuit affirmed on other grounds. The court noted that the plaintiff initially could have challenged the constitutionality of the rule either in the state court or in the federal district court. 487 F.2d at 141, 143. However, because the plaintiff had presented his constitutional claim to the state court and failed to pursue

his state appellate remedies, he was precluded from abandoning the state courts to seek review in the federal district court. *Id.* at 141. *Cf. Hicks* v. *Miranda*, 422 U.S. 332, 351 at n. 20 (1975).

Getty v. *Reed*, 547 F.2d. 971 (6th Cir. 1977), cited by the petitioner in his supplemental petition, adds no weight to his contention that his petition should be granted. The conflict, if any, is between *Getty* and *Tang*, *supra*, on the issue of *res judicata*, an issue which is not involved in the present case. However, it is relevant to this case to note that *Ginger* v. *Circuit Court*, cited in this brief above at n. 2, was reaffirmed in *Getty*. 547 F.2d at 974. This evidences the Sixth Circuit's continuing adherence to the rule applied by the Tenth Circuit in this case.

The case now before this Court is not a case of concurrent jurisdiction. The district court below expressly disclaimed any reliance on *res judicata* or on the plainitiff's failure to reserve his constitutional claims. *See* Petition at 58, n. 5. Unlike the plainitiff in *Tang*, Doe did not have the option of bringing this action in the federal district court. As Judge Breitenstein stated, concurring in the judgment below, "Doe's recourse was to petition the Supreme Court of the United States for certiorari review of the action of the state supreme court." Petition at 47.

CONCLUSION

For the reasons discussed above, the respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

FOR THE ATTORNEY GENERAL:

MARY J. MULLARKEY
First Assistant Attorney General
Appellate Section

Attorney for Respondents

1525 Sherman Street, Rm. 306
Denver, Colorado 80203
Telephone: (303) 892-3611